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The Law relating to Waters :
Sea, Tidal, and Inland.



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THE LAW
RELATING TO
W A T E R S ,
SEA, TIDAL AND INLAND.

BY
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PREFACE.



IN the present Volume, the Authors have endeavoured to give a comprehensive view of the whole law relating to Water.

The considerable changes which have been made by the Legislature of late years in the various branches of the law bearing upon the subject,¹ the further changes which appear to be in immediate contemplation,² and the fact that recent and important decisions of the highest Court of the kingdom have finally settled many points hitherto considered doubtful, have appeared to the Authors a sufficient justification of the task which they have undertaken.

No general Text-book on the subject has appeared in England for more than twenty years. The Second Edition of Woolrych on Waters was published in 1851, and Mr. Phears' Treatise on the Rights of Water in 1859. Mr. Woolrych's work, though exceedingly useful at the time it was written, has necessarily become of little value as a book of reference; it, moreover, contains no notice of the laws regulating the navigation and conservancy of the inland waters of the kingdom. Mr. Phears' Treatise, and Mr. Gale's

¹ Notably "The Territorial Waters Act, 1878;" "The Rivers Pollution Act, 1875;" "The Fresh Water Fisheries Act, 1878;" and "The Canal Boats Act, 1877."

² "The Rivers Conservancy Bill," which passed the House of Lords last Session, 1879; "The Thames Sewerage Bill;" and "The London Water Companies Purchase Bill."

standard work on Easements, are restricted to the consideration of those natural and acquired rights to the use of Water which are considered in Chapters III. and IV. of the present Work. Mr. Angell's great works on "Water-courses (1869)" and "Tidal Rivers (1849)," though of the highest value to legal students, are naturally devoted for the most part to American law, which on many important points differs materially from our own.

The Authors have thought it necessary to treat shortly of the Sea and Navigation thereon, though aware that such a wide field trenches on the domain of International Law; for all details of this subject they have referred to the standard works on International Law and the Law of Merchant Shipping. They have avoided, as far as possible, the consideration of the Acts relating to Public Health and Sewers, feeling that such a subject hardly comes within the scope of a general work on Water.

Few suggestions or criticisms have been made on the existing state of the law, and the Authors have confined themselves, as far as possible, to the decisions of the Courts as expressed in the words of learned Judges. They hope that this attempt to unite in one volume the various branches of the Law of Waters may be of some use to the profession, at least as a book of Reference.

H. J. W. C.

U. A. F.

1, BRICK COURT, TEMPLE,
May, 1880.

PLAN OF THE WORK.



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ADDENDA ET ERRATA.

Page 1, note (2)—For “per Lord Kenyon, in *Blundell v. Catteral*,” read “per Lord Kenyon, in *Ball v. Herbert*, cited in *Blundell v. Catteral*.”

Page 3, line 13—For “stat. 3 Ric. II.” read “stat. 15 Ric. II. c. 3.”

Page 14—By 29 & 30 Vict. c. 62, s. 7, all rights and interests of the Crown in the shore of the sea, creeks, estuaries and tidal rivers are transferred from the management of the Commissioners of Woods and Forests to the Board of Trade.

Page 15, line 25—For “sea,” read “sea shore.”

Page 44, line 22—For “17 & 18 Vict.,” read “16 & 17 Vict.,” and in note (2), for “500” read “535.”

Page 102, line 8—For “natural,” read “*naturæ*.”

Page 150, note (5), line 26—For “continue,” read “combine.”

Page 184—Instead of note (1) read as follows:—

“The expression ‘*other* rights or powers’ in this section makes it somewhat difficult of construction, but if read in connection with the preamble to the Act it would seem to be the intention of the legislature not to interfere with easements of pollution acquired before the passing of the Act, but to prevent the acquisition of such easements for the future.”

Page 426 (side-note)—For “destruction,” read “obstruction.”

Page 463, line 6—For “c. clxvii,” read “c. cxlvii.”

Page 473, line 4—For “c. 113,” read “c. cxlvii.”

Page 532, note (1)—For “c. 75,” read “c. 5.”

Page 662, line 12—For “22 Hen. III.,” read “22 Hen. VIII.”

The Law relating to Waters.

CHAPTER I.

OF THE SEA, AND RIGHTS THEREIN.

The High Seas.

THE high seas include the whole of the seas below low water mark and outside the body of a county.¹ Definition.

The realm of England only extends to low water mark, and all beyond is the high seas.²

The reason of the thing, the preponderance of authority, and the practice of nations, have decided that the main ocean, inasmuch as it is the necessary highway of all nations, and is from its nature incapable of being continuously possessed, cannot be the property of any one

Property in
bed.

¹ As to this see *Reg. v. Keyn*, 2 Ex. Div. 63, see *post*; see also *Leigh v. Buzzley*, Ow. 122, per Lord Coke, C. J.

² It seems certainly to have been the general opinion of writers on international law that the territory of a state extends to the distance of three miles or more, or the distance of a cannon shot, seaward from low water mark; but the case of *Reg. v. Keyn*, 2 Ex. Div. 63, which will be noticed later, establishes the proposition stated in the text, Cockburn, C. J., remarking that writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding,

the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage; see p. 201. Cf. per Lord Kenyon in *Blundell v. Catteral*, 5 B. & A. 268. See also as to this, Selden, *Mare Claus.*, bk. 2; Hale de Jure Maris, Harg. Tr. p. 10; Grotius de Jure Belli, lib. ii. c. 2, s. 13; Bynkershoek de Dom. Mar.; Vattel, *Droit des Gens*, s. 288; Hautefeuille, *Droit Maritime*, p. 197; Ortolan, *Diplomatie de la Mer*, liv. 2, c. 8; Wheaton's *International Law*, by Boyd, p. 237; Phillimore's *International Law*, vol. 1, cc. vi. and vii.

State. It is possible, however, that a nation may acquire exclusive right of navigation and fishing of the main ocean *as against another nation*, by virtue of the specific provisions of a treaty; for it is competent to a nation to renounce a portion of its rights; and there have been instances of such renunciations both in ancient and modern times.¹ It would appear also that a nation may give a tacit consent to the appropriation of certain portions of the sea for fishing and navigation by *non user*.²

The free navigation, commerce, and fishery in the high seas is therefore the common right of all mankind;³ and as a physical necessity, the soil of the bed of the sea can be the exclusive property of no one individual or nation, except in those rare cases where a portion of the bed of the sea has been beneficially occupied for a sufficient time by any one nation to give a prescriptive right to that portion, by the acquiescence of the other nations. The writers on international law have questioned how far that particular species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it is called, the uninterrupted possession of territory or other property for a certain length of time by a State excludes the claim of every other.⁴ It would also appear, that when the sea or the bed on which it rests can be physically occupied permanently—as by the erection of piers, harbours, breakwaters or forts—it may be the subject of occupation, the same as an occupied territory, independently of prescription. In point of fact, such encroachments are generally made for the benefit of the navigation, and are therefore readily acquiesced in. But whether, if an encroachment in the sea were such as to obstruct the navigation to the ships of other nations, it would not amount to just cause

¹ Phillimore's International Law, vol. 1, pp. 210, 211.

² Vattel, *Droit des Gens*, t. 1, c. xxiii.

³ Wheaton's International Law, by Boyd, p. 251.

⁴ *Ibid.* p. 220.

for complaint as inconsistent with international rights, might, if the case arose, be deserving of serious consideration.¹

The high seas, as has been said, are open to all the world, and the ships of every nation are free to navigate them. The ships of all nations while so navigating the high seas are only subject to the laws of their own country; and no one nation has the right to exercise civil or criminal jurisdiction over the ships of other nations while passing over the high seas between one foreign port and another.² Navigation.

The English Court of the Admiralty has from the earliest times exercised criminal jurisdiction over English ships on the high seas all over the world.³ By *stat. 3 Ric. II.*, it was enacted that the admiral should have no jurisdiction within the body of counties either by land or sea, except for mayhem and murder done in great ships being and hovering in estuaries and mouths of great rivers below the bridges, where he should have a concurrent jurisdiction with the Courts of common law. Upon this footing the criminal law has remained ever since, the jurisdiction of the admiral having been transferred to the Central Criminal Court by 4 & 5 *Will. IV. c. 36*.

Although the laws of trade and navigation cannot affect foreigners beyond the territorial jurisdiction of a State so as to render them criminally liable to those laws, the English legislature has asserted a certain dominion over foreign ships by the 527th section of the *Merchant Shipping Act*, 17 & 18 *Vict. c. 104*. This section provides that "Whenever any injury has in any part of the world been caused to any property belonging to her Majesty, or to any of her Majesty's subjects, by any foreign ship, if at any time thereafter such ship is found in any port or

Merchant
Shipping Act,
1864, s. 527.

¹ Cockburn, C. J., *Reg. v. Keyn*, 2 Ex. Div. p. 198.

² *Reg. v. Keyn*, 2 Ex. Div., per Kelly, C. B., p. 217; *The Vigilantia*, 1 C. Rob. 1; *The Frow Anna Catherina*, 5 C. Rob. 161; *The Success*, 1 Dodds, Ad. 131.

³ Foreigners on board English ships are subject to English law. See *Reg. v. Sattler*, Dears. & B., Cr. C. 525; *Reg. v. Anderson*, L. R., 1 Cr. C. 161; *Reg. v. Lesley*, Bell, Cr. C. 220.

“ river of the United Kingdom, or within three miles of the coast, if it be shown that such injury was probably caused by misconduct or want of skill of the master or mariners, it may be detained until satisfaction be made for the injury, or security be given to abide the event of any action or suit.” Cockburn, C. J., doubts whether this section would apply to a ship on a foreign voyage, as the authority is to *detain* and not to *seize*, and would seem applicable only to a vessel voluntarily seeking our waters otherwise than for the purpose of passage, and so bringing itself within our jurisdiction.¹

Pirates.

Pirates, being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high sea by the armed vessels of any particular State, and brought within its territorial jurisdiction for trial at its tribunals.²

Tolls.

The sea, being the great highway of the world, no tolls are demandable for vessels navigating it. This freedom is, however, subject to exceptions arising from benefits done to the community at large which form a just consideration for a toll,—such as the formation of ports, harbours, and the like, and the maintenance of lights, buoys and beacons.³ “If,” says Hale, C. J., “any man will pre-
scribe for a toll upon the sea, he must allege good consideration; because, by Magna Charta and other statutes, every man has a right to go and come upon the sea without impediment.”⁴ An Act of Parliament will, of course, be effectual to enforce a toll anywhere within its operation.⁵ The right of navigation includes the right of anchoring; and no tolls can be taken for anchorage unless in a port or harbour.⁶

Fishery.

There is no limit imposed by the common law or by

¹ *Reg. v. Keyn*, 2 Ex. Div. p. 218.

² Wheaton's International Law, p. 168. As to “Navigation,” see more fully Chap. VII.

³ Hale de Jure Maris, Harg. Tr. 51; *Gann v. Free Fishers of Whit-*

stable, 11 H. L. 193.

⁴ 1 Mod. 105.

⁵ Woolrych on Waters, p. 299.

⁶ *Gann v. Free Fishers of Whitstable*, *supra*. As to tolls, see further p. 45, *post*, and Chap. VIII.

international law, either as to the description of fish that may be caught on the high seas, or the means of catching them, or the season during which they may be caught. But it would appear that a nation may bind itself by treaty, or, perhaps, even by *non user*, from participating in this common right at certain places in favour of other nations.¹ Where this right is exercised by several nations, the customs of other nations must be respected, even in places which are free to all the world.²

Although, as has been stated, the realm of England only extends to low water mark, and all beyond is high seas, yet the common consent of civilized independent States, which constitutes international law, has undoubtedly appropriated a certain portion of the high seas washing the shore of each State to that State for the fuller enjoyment and protection of its rights. The distance to which these so-called territorial waters extend appears generally to be fixed at three nautical miles; but this distance is not absolute, and is liable to be altered by the provisions of particular treaties.³ The extravagant doctrine laid down by *Selden* in his *Mare clausum*, and followed by *Hale de Jure Maris*, that the four seas washing the coasts of England were in the absolute dominion and ownership of the sovereign of England, has long ago given way to the influence of reason and common sense; but it was up to the decision of the recent case, *Reg. v. Keyn*, a *vexata quæstio*, giving rise to much difference of opinion, whether the dominion which is admitted to exist by the sovereign of England over such territorial waters is an absolute dominion, so as to constitute such territorial waters part of the realm of England, and vest the property of the soil below the water in the Crown, or whether it is a more limited dominion dependent not on original or inherent

Territorial
waters.
Jurisdiction
of the Crown.

¹ Phillimore's International Law, vol. 1, p. 213; Vattel, t. 1, l. 1, c. xxiii., sec. 286.

Granville, 1 Taunt. 248. As to "Fishery," see further Chap. VI.

³ Phillimore's International Law, vol. 1, p. 237.

² *Fennings and others v. Lord*

right, but on the acquiescence of other nations, and so limited by such acquiescence to the particular purposes for which such dominion has been acquiesced in.

Reg. v. Keyn. In the case of *Reg. v. Keyn*,¹ the defendant, a foreigner, commanding a foreign ship on a voyage to a foreign port, was tried and convicted of manslaughter at the Central Criminal Court for running down an English ship within three miles of the shore of England, and causing the death of a passenger under circumstances which amounted to manslaughter by English law. The learned judge at the trial, Pollock, B., reserved the question of jurisdiction for the Court for Crown Cases Reserved. The case was twice argued; the second time before fourteen judges, and the conviction was quashed by a majority of seven to six, one judge, Archibald, J., having died before the judgment was given, who would have agreed with the majority of the Court. It being admitted that the defendant being a foreigner on board a foreign ship, could not have been tried by an English Court if the crime had been committed on the high seas out of British territory, the real question in the case was whether this spot on the high seas where the collision occurred was or was not within the British territory. The minority of the Court, Lord Coleridge, C. J., Brett and Amphlett, JJ. A., Grove and Lindley, JJ., held that by the law of nations, the open sea within three miles of the coast of England is a part of the territory of the nation as much and as completely as if it were land a part of the territory of the nation, and that every enactment, whether of statute or of common law, applied to the whole of such territory, and that, therefore, the Central Criminal Court which succeeded to the criminal jurisdiction of the admiral over the seas without the body of a county, but within the territorial jurisdiction of the realm, had jurisdiction to try the case. Denman, J., agreed with the minority on the ground that the act causing death was

¹ 2 Ex. Div. 63.

committed on board the English ship, and so constructively *Reg. v. Keyn.* on British territory. The majority of the Court, Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, JJ., Sir R. Phillimore and Pollock, B., held that the Central Criminal Court had no jurisdiction, and quashed the conviction. The elaborate judgment of Cockburn, C. J., with which the majority of the Court substantially agreed, was to the effect, that although the common consent of nations had appropriated the sea within three miles of the shore to the adjacent State to deal with as such State might think fit and expedient for its own interests, yet such concurrent assent that a portion of what was before treated as the high seas, and, as such, common to the world, should be treated as British territory, could not of itself, without the authority of Parliament, convert that which before was in the eye of the law high sea into British territory, and so change the law or give to the Courts of this country a jurisdiction over the foreigner where they had it not before. Sir R. Phillimore seems rather to imply a doubt as to the power of Parliament to legislate for these waters, so as to bind other nations, except for the purposes of the protection and peace of the State; but Lush, J., particularly guards himself from seeming to imply any doubt as to the competency of Parliament to legislate as it may think fit for these waters; and his short judgment expresses in a few words his view of the law.¹ “I have already announced that, although I had prepared a separate judgment, I did not feel it necessary to deliver it, because, having since perused the judgment which the Lord Chief Justice has just read, I found that we agreed entirely in our conclusions, and that I agreed in the main with the reasons on which those conclusions are founded. I wish however to guard myself from being supposed to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage

¹ 2 Ex. Div. 238.

“ and the common consent of nations, which constitute
“ international law, have appropriated these waters to the
“ adjacent State, to deal with them as the State may deem
“ expedient for its own interests. They are, therefore, in
“ the language of diplomacy and of international law,
“ termed by a convenient metaphor the territorial waters
“ of Great Britain, and the same or equivalent phrases are
“ used in some of our statutes, denoting that this belt of
“ sea is under the exclusive dominion of the State. But
“ the dominion is the dominion of Parliament, and not
“ the dominion of the common law. That extends no
“ farther than the limits of the realm. In the reign of
“ Richard II., the realm consisted of the land within the
“ body of the counties. All beyond low water mark was
“ part of the high seas. At that period the three mile
“ radius had not been thought of. International law,
“ which, upon this subject at least, has grown up since
“ that period, cannot enlarge the area of our municipal
“ law; nor could treaties with all the nations of the world
“ have that effect. That can only be done by Parliament.
“ As no such Act has been passed, it follows that what
“ was out of the realm then, is out of the realm now, and
“ what was part of the high seas then, is part of the high
“ seas now, and upon the high seas the Admiralty juris-
“ diction was confined to British ships. Therefore, al-
“ though as between nation and nation these waters are
“ British territory, as being under the exclusive dominion
“ of Great Britain, in judicial language they are out of
“ the realm, and any exercise of criminal jurisdiction over
“ a foreign ship in these waters must, in my judgment, be
“ authorized by an Act of Parliament.”

41 & 42 Vict.
c. 73.

This appears to be the view taken by the legislature, for immediately after the decision of the case, an Act entitled *The Territorial Waters Act*, was passed, defining the territorial waters of her Majesty's dominions to be so much of the sea adjacent to the coast as is deemed by international law to be within the territorial waters of her

Majesty, and declaring that for the purposes of the Act any part of the sea within a marine league of the coast, measured from low water mark, shall be open sea within the territorial waters of her Majesty's dominions. It then enacts, that any offence committed by a person, whether he is or is not a subject of her Majesty within the territorial waters of her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who commits it may be arrested and tried and punished accordingly.

This statute does not enlarge or declare the law as to the ownership of the bed of the sea below low water mark, and it would appear, according to the decision of *Reg. v. Keyn*, that as no statute has been passed so appropriating it, except in the case of an uninterrupted occupation for a sufficient time to gain a title by prescription, the Crown would have no right in the bed of the sea beyond low water mark, and within three miles as against other nations.¹ The question as to whether the Crown is entitled to the ownership of the soil beneath the sea within three miles, has never been directly raised apart from the question of jurisdiction; and though it would appear now to be finally settled by *Reg. v. Keyn* that the Crown has no such rights below low water mark, it should be mentioned that in the case of *Gammell v. Commissioners of Woods and Forests*,² Lord Wensleydale, and apparently Lord Cranworth, are of opinion that the soil of the shore within three miles is in the Crown, as are also Lord Chelmsford and Erle, C. J., in *Gann v. Free Fishers of Whitstable*.³

That the Crown can acquire a title to mines below low water mark as against a subject, is shown by the dispute

Title of the Crown to soil below low water mark as against other nations.

As against a subject.

¹ As to this see *Blackpool Pier v. Fylde Union*, 46 L. J., M. C. 189, where the Court of Common Pleas held that the part of a pier below low water mark was out of the realm, and so not rateable to the poor as an extra parochial place within 31

& 32 Vict. c. 122, s. 27.

² 3 McQueen, H. L. 419.

³ 11 C. B., N. S. 387; 11 H. L. 192; see also judgment of Brett, J. A., in *Reg. v. Keyn*, 2 Ex. Div. p. 124.

between the Crown and the Duchy of Cornwall, which resulted in the *stat.* 21 & 22 *Vict. c.* 109. That statute enacts that the mines and minerals below low water mark are, as between the Queen's Majesty in right of her Crown, and His Royal Highness the Prince of Wales in right of his Duchy of Cornwall, vested in her Majesty in right of her Crown, as part of the soil and territorial possessions of the Crown.¹

Protection of
revenue, etc.

Various treaties and statutes for the maintenance of neutral rights during war, and the prevention of breaches of the revenue and fishery laws are now in force, and most of them recognize three miles as the limit, though this limit is not universal, for it is admitted by international law that a nation is entitled to take such measures as it may deem necessary for the protection of its revenue within a reasonable distance of its shores.²

The result of the authorities seems to be briefly as follows:—

1. The realm of England only extends to low water mark; all beyond is the high sea.

2. For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.

3. This concession is evidenced by treaty or by long usage.

4. In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the Crown. This must be done by the act of the legislature.

Navigation.

The laws relating to navigation are, with the foregoing exceptions, the same within as without the territorial waters. These waters are free to the peaceful navigation as well by foreign as by English ships.³ According to international law, it is certainly the right incident to each

¹ See remarks of Cockburn, C. J., in this case, which was much relied on by the defendant in *Reg. v. Kryn.*

² Cockburn, C. J., 2 Ex. D. p. 216.

³ *The Saxonian*, 1 Lush. 410.

State to refuse a passage to foreigners over its territory by land, whether in time of peace or war; but it does not appear that a nation has the same right with respect to preventing the peaceful passage of foreign ships in time of peace over this portion of the high seas.¹

A foreign vessel, therefore, on a voyage to a foreign port, and having this right of passage over the sea within three miles of the English coast, is not subject to the English municipal law in the absence of express provision by Act of Parliament;² but a foreign vessel seeking an English port is liable to English law.³ By 41 & 42 Vict. c. 73,^{41 & 42 Vict. c. 73.} foreigners on board foreign ships, and passing within three miles of the English coast, are now made subject to the English criminal law.

There can be no doubt but that by treaty, or by the Fishery. implied assent of nations, the right of fishing within three miles of the coast of the United Kingdom is vested exclusively in the inhabitants subjects of her Majesty.⁴

By 31 & 32 Vict. c. 45, the fisheries on the coasts of France and England are regulated as between the English and French; and by Article 1 of the convention between the two countries annexed to the statute, it is provided that British fishermen shall have the exclusive right of fishing within the distance of three miles from low water. The fisheries are regulated by various statutes prescribing the manner in which fish may be taken, and the close seasons, &c., which will be treated fully in another chapter.⁵

It has been laid down that the territory or realm of England is that over which the common law of England extends, or, in other words, all that is within the body of a county, and that the county extends to low water mark, where the high seas begin.⁶ Hence those creeks or arms of the sea which lie within the body of a county will be

¹ Sir R. Phillimore, 2 Ex. Div. *Cunningham's case*, Bell, Cr. C. 72.
82.

⁴ As to this see *Gammel v. Woods and Forests*, 3 McQ. H. L. 419.

² *The Saxonia*, 1 Lush. 410.

⁵ See Chap. VI.

³ *The Annapolis*, 1 Lush. 295;
The Joanna Stoll, 1 Lush. 295;

⁶ *Reg. v. Keyn*, 2 Ex. D. 67, 197.

governed by the rules of law relating to inland tidal waters, which are treated of in a succeeding chapter, while those inlets of the sea which do not so lie within the body of a county will form part of the territorial waters of the State, and be governed by the laws relating to such territorial waters which have been stated in the preceding pages.

The question as to what portion of the sea is so within the body of a county, is a somewhat difficult one, and is one which, it would appear, must be decided by evidence in each particular case. It is said by Hale that an arm or branch of the sea which lies *intra fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county;¹ and Lord Coke, in the case of *Leigh v. Burley*,² observes that the admiral should have no jurisdiction where a man may see from one side to another, to which the other justices agreed. This view is confirmed by Cockburn, C. J., in *Reg. v. Keyn*, and may be taken to be settled law.³

The Sea Shore.

Definition and limits.

The sea shore may be defined as that portion of the land adjacent to the sea which is alternately covered and left dry by the ordinary flux and reflux of the tides. Although, in common parlance, the word shore has often a more extensive meaning—taking in all that extensive belt of waste ground or strand, shingles, and rock liable to the action of every kind of tide,—yet it is now finally settled, that in legal intendment no more of that unclaimed

¹ De Jure Maris, p. 10, Harg. Tracts.

² Ow. 122.

³ 2 Ex. Div. pp. 164, 168. It is stated by writers on international law that the exclusive territorial jurisdiction of the British Crown has extended immemorially to those bays called the *King's Chambers*—i. e. portions of the sea cut off by lines drawn from one promontory to another—but it would seem doubtful whether this

jurisdiction was anything else than the right of defence before mentioned, which is admitted to exist for the protection of peace and the revenue; see, however, Sir R. Phillimore, *Reg. v. Keyn*, 2 Ex. D. 71; see also Wheaton, Int. Law, p. 240; Vattel, Droit des Gens, liv. 1, ch. 22, s. 281; Phillimore, Int. Law, vol. 1, p. 239; Life of Sir L. Jenkins, vol. ii. pp. 727, 728, 780.

tract is sea shore than that portion which lies between high and low water mark at ordinary tides.¹ This point has been finally settled by the case of *Attorney-General v. Chambers*,² in which the Lord Chancellor Cranworth, assisted by Maule, J., and Alderson, B., held that the sea shore landwards is, in the absence of particular usage, *primâ facie* limited by the line of the medium high tide between the spring tides and the neap tides; or, in other words, that part of the shore which for four days in every week, or for the most part of the year, is reached and covered by the tides.³ As this line will vary as the sea recedes from or encroaches on the land, so the boundaries of the shore will vary with the recession or encroachments of the sea.⁴ Land above this line, though overflowed by high spring and extraordinary tides, is not shore, but is presumed to be land the property of adjoining owners.⁵

The sea shore, as above defined, forms part of the body of the adjoining county, the justices of which, and not the admiralty, have cognizance of offences committed there, whether committed when the shore is or is not covered with water;⁶ it does not, however, in the absence of evidence, form part of the adjoining parish, but is *primâ facie* extra-parochial. It may be in a parish or a manor, but there is no presumption of law that it is within either.⁷ Now, however, by 31 & 32 *Vict. c. 122, s. 27*, every accretion from the sea, whether natural or artificial, and the part of the sea shore to the low water mark, are annexed to and incorporated with the parish to which they adjoin, in proportion to the extent of the common boundary, for all civil parochial purposes; and are there-

Forms part of the body of the adjoining county, but not *primâ facie* of the adjoining parish or manor.

¹ Hall on the Sea Shore, p. 8.

² 4 De Gex, M. & G. 206.

³ See also *Blundell v. Catteral*, 5 B. & Ald. 268, per Holroyd, J.; and *Lowe v. Govett*, 3 B. & A. 813, per Lord Tenterden, C. J.

⁴ *Scratten v. Brown*, 4 B. & C. 485.

⁵ *Lowe v. Govett*, 3 B. & A. 813.

⁶ *Embleton v. Brown*, 3 E. & E. 234; *Reg. v. Musson*, 8 E. & Bl. 900.

⁷ *Reg. v. Musson*, 8 E. & Bl. 900; *D. of Bridgewater's Trustees v. Bootle-cum-Linacre*, L. R., 2 Q. B. 4; see also *Reg. v. Gee*, 1 E. & E. 1068.

fore liable to be rated to the poor. This statute has been held not to apply to the part of a pier extending below low water mark, and built on iron piles driven into the sands, so that the water flowed under it, no alteration being made in the line of low water mark—the Court holding that, on the authority of *Reg. v. Keyn*, this portion of the pier was out of the realm and jurisdiction of England, and that it moreover was not an “accretion” within the words of the act.¹ The shore is an extra-parochial place within the Nuisance Removal Act, 18 & 19 *Vict. c. 121*, s. 22.²

Property in soil of the shore between high and low water mark in the Crown.

The property in the soil of the shore of the sea, of estuaries and arms of the sea, and of navigable rivers between high and low water mark, is *primâ facie* vested of common right in the Crown;³ but it may belong to a subject by ancient grant or charter from the Crown, or by prescription.⁴ This ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the public rights of navigation and fishery.

But subject to public rights.

The ownership of the Crown in the sea shore is compared by Lord Hale to the ownership of lords of manors in the common and waste lands of the manor. The soil and freehold of the waste belong to the lord, but subject to certain rights of manorial tenants; so the king is lord of the great waste of the sea, subject to certain beneficial rights and privileges of fishing, navigation, &c., immemorially enjoyed by his subjects therein by the custom of the realm, which is the common law.⁵ The grantee of the Crown takes subject to this public

¹ *Blackpool Pier v. Fylde Union*, 46 L. J., M. C. 129.

² *Reg. v. Lee*, 1 E. & E. 1068.

³ *Mayor of Penryn v. Holme*, 2 Ex. Div. 328; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *A.-G. v. Parmeter*, 10 Price, 378; *Smith v. Officers of State of Scotland*, 13 Jur. 713; *Blundell v. Catteral*, 5 B. & Ald. 268; *A.-G. v. Chambers*, 4

De G., M. & G. 206; *Bagot v. Orr*, 2 Bos. & Pull. 472; see also *Bristow v. Cormican*, 3 App. C. 641; *Malcolmson v. O'Dea*, 10 H. L. 593.

⁴ *Calmady v. Rowe*, 6 C. B. 861; *A.-G. v. Jones*, 33 L. J., Ex. 249; see also cases at p. 15 of Hall on the Sea Shore.

⁵ *De Jure Maris*, c. iv.; Hall on the Sea Shore, p. 4.

right, and he cannot, in respect of his ownership of the soil, make any claim, or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.¹

Any interference with the public rights is a nuisance and the subject of indictment or information, and of an action on proof of special damage.² Nuisances.

Any unauthorized intrusion or encroachment on the soil of the shore, such as the building of quays, piers, moles, &c., is termed a *purpresture*, and may be abated by the Crown or the owner of the shore,³ or restrained by injunction at suit of Attorney-General, whether they create a nuisance or not.⁴ Such *purprestures* may or may not be nuisances to the navigation; whether they are so or not is a question of fact.⁵ Purprestures.

The right to take wreck and royal fish, and the right before Magna Charta to create a several fishery to the exclusion of the public, belong to the Crown as a part of the royal prerogative distinct from the ownership of the shore, and may, as such, be communicated to the subject by grant or charter.⁶ Wreck, royal fish, and several fishery.

There is no doubt but that a subject may be owner of a portion of the sea shore by express grant from the Crown.⁷ The alienation of Crown lands is now, however, prohibited by statute law;⁸ and so much therefore of the sea as has not actually been aliened still remains vested in the Crown, incapable of alienation except by Act of Parliament.

The ownership of the Crown in the sea shore being, as has been said, for the public benefit, grants of portions of

¹ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

² *R. v. Grosvenor*, 2 Stark. 511; *Duke of Newcastle v. Clark*, Moo. Rep. 666; *R. v. Clark*, 12 Moo. 615; *A.-G. v. Richards*, 6 Anstr. 613; *Rose v. Miles*, 4 M. & G. 161.

³ ⁴ Blackstone's Comm. 271, note; Angell on Tide Waters, 198.

⁴ See *post*, as to REMEDIES, Chap. IX.

⁵ *Reg. v. Betts*, 16 Q. B. 1022; *R. v. Randall*, Car. & M. 496; *A.-G. v. Terry*, L. R., 9 Ch. 423.

⁶ See *post*, p. 37.

⁷ Hall, pp. 6, 15.

⁸ 1 Anne, c. 7, s. 5; *Doe d. R. v. York*, 14 Q. B. 81.

it to an individual subject are, as it were, an encroachment on the public right and against good policy ; and, therefore, the Courts are inclined to construe such grants strictly in favour of the Crown *pro bono publico* and against the grantees.¹ The same rules, however, of common sense and justice must apply in the construction of a deed, whether the subject matter of construction be a grant from the Crown or from a subject—it being always a question of intention to be collected from the language used with reference to the surrounding circumstances.²

By pre-
scription.

In absence of express grant of the shore, the question arises whether a title to it as against the Crown can be acquired by a subject by user and prescription, giving rise to the presumption of a grant.

Hall, in his essay on the *Sea Shore*,³ discusses this point elaborately, and comes to the conclusion that as the shore is land, it must be governed by the same rules of law as to title and proof of title as *terra firma* ; and that as prescription and user can give no title to lands, especially as against the Crown, such title, in the absence of express grant, can only be supported by evidence of adverse possession for the full period prescribed by the Statutes of Limitations relating to Crown lands—viz. sixty years. He further argues that the evidence capable of supporting such adverse possession must be similar to that which will support a claim by adverse possession to inland estates—viz. evidence of occupation and actual possession ; and that, therefore, the user of rights and privileges—such as the right to wreck, several fishery, royal fish, and, perhaps, digging sand, which are separable from the ownership of the soil, and do not imply a title to it—cannot be evidence to support a claim to absolute ownership of the soil.³

Phear, in his *Rights of Water*, takes a view more favourable to claimants against the Crown. “Almost all beneficial

¹ See *Royal Fishery of the Banne*, Davies' R. 157 ; *D. of Somerset v. Fogwell*, 5 B. & C. 875 ; Hall on the Sea Shore, p. 17.

² *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473.

³ Hall, pp. 16—40.

“enjoyment of land,” he says, “is necessarily so exclusive in its character as to leave but little opening for question as to its possession. It is only with regard to waste land, waters and the sea shore that any real doubt can arise. On the other hand, of these latter the sea shore especially is, by its very nature, so little capable of exclusive possession, that the most undoubted owner of it finds it very difficult to support his title by user. In some sense, ownership may be said to be an aggregate of exclusive easements; the greater the number of them which are openly exercised, the stronger is the probability of the greater right being the true foundation of that exercise. Where, as in the case of the sea shore, the incidents of enjoyment are very few, it is not easy to say whether the user of one or two of them is to be referred to the greater or the lesser right. No general rules of guidance can be laid down, but perhaps it may be assumed, that to make acts evidence of ownership, they must appear, under the circumstances which surround them, to have been done *animo habendi, possidendi et appropriandi*.”¹

Which of these views of the law would be held correct in the case of a claim by a subject to a portion of the sea shore *in gross*, where the actual title as against the Crown would be in dispute, cannot be said to be as yet determined, as there appears to be no reported case in which such a claim has been advanced on the ground of the exercise of such rights alone; but in the case of claims to foreshore, as forming parcel of manors,² and even as forming parcel of lands adjacent to the sea, where the manor is not expressly granted,³ the Courts have adopted the more liberal construction, holding that evidence of the user of various rights and privileges is admissible to show that the part of the shore claimed forms parcel of the adjoining manor or lands. In actions against mere trespassers, a sufficient

¹ Phear on the Rights of Water, 128; *A.-G. v. Chambers*, 4 De G. & J. 55.

² *A.-G. v. Jones*, 2 H. & C. 347; *In re Belfast Dock*, Ir. R., 1 Eq. ³ *Chad v. Tilsed*, 5 Moo. 185; *Brew v. Haren*, Ir. R., 11 C. L. 198.

possessory title can be established by persons claiming foreshore, without producing evidence sufficient to displace the title of the Crown.¹

Foreshore
may form
parcel of a
manor.

There is no doubt that the foreshore may form parcel of a manor;² and in fact claims to foreshore by a subject are almost invariably made by lords of sea-side manors.

Effect of
grant of sea-
coast manors.

Where the grant of the manor is express and unambiguous, the title to the shore will depend wholly on the construction of the metes and boundaries of the grant, which will, as has been said, be construed *stricto jure* in favour of the Crown and against the grantee.³ Thus if the boundary be expressed to be down to the sea, it is presumed that the ordinary high water mark is intended as the boundary line; but if it is expressed to be down to low water mark, this will be tantamount to a grant of the shore.⁴

In fact land granted, whether situate upon the sea coast or inland, is co-extensive with the words of the grant, and no more. A grant, therefore, of a sea coast manor does not necessarily include the foreshore, though it may do so.⁵

Acts of
ownership
admissible to
prove extent
of grant.

Where the owner of an adjoining manor, whose title to the manor from the Crown is not disputed, claims a portion of the sea shore as forming parcel of that manor, the question is really one of boundary, and not of title; and in such cases it has been decided that acts of continuous ownership, including under this head such rights as those of taking wreck and royal fish, digging stones and

¹ *Corporation of Hastings v. Ivall*, L. R., 19 Eq. 558. "Actual possession of the *locus in quo* would have been not merely evidence of title, but actually a title against wrongdoers." Per Lord Blackburn, in *Bristow v. Cormican*, 3 App. C. 660.

² *Calmady v. Rowe*, 6 C. B. 861; *Duke of Beaufort v. Swansea*, 3 Ex. 413; *Sir H. Constable's case*, 5 Rep. 107; *Hale de Jure Maris*, Harg. Tracts, 27; *Case of Barons of Barclay*, Harg. Tracts, 34.

³ But see *ante*, p. 16.

⁴ In *Corporation of Hastings v. Ivall*, L. R., 19 Eq. 558, where there was a grant by Queen Elizabeth of all that her parcel of land called the "Stone Beache," it was held that, as the name Stone Beach now applied to the entire beach below as well as above high water mark, such grant, as against a person not claiming any title himself, must be presumed to include the whole foreshore; see also *In re Belfast Dock*, Ir. R., 1 Eq. 128.

⁵ *Hale de Jure Maris*, p. 18.

sand, and cutting seaweed, and the enjoyment of an exclusive fishery may be called in to explain the grant and to prove the portion of the sea shore claimed to be within the boundaries of the manor granted.¹

Thus it has been held, that where the Crown granted all the regions, countries, or territories of C., and the boundary sea-ward was the bank of the bay of K., as the description did not necessarily exclude from the grant the shore of the bay between high and low water mark, continuous acts of ownership were admissible against the Crown to prove that the foreshore was included in the grant.²

So in *A.-G. v. Jones*,³ on the trial of an information of intrusion, the question being as to the title of the defendant as against the Crown to the sea shore between high and low water mark, the defendant gave in evidence a grant of a manor, with fishery, wrecks of the sea, &c.; and also gave in evidence various acts of ownership, such as taking sand and gravel, and preventing others from doing so. The learned judge told the jury that the grant of the manor did not pass the shore, and left it to the jury to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the Crown; but the Court of Exchequer held this a misdirection, and that the proper question for the jury was, whether the evidence of user, *coupled with the grant*, satisfied the jury that the defendant had such title.

In *The Duke of Beaufort v. Swansea*,⁴ it was held that the sea shore between high and low water mark may be parcel of the adjoining manor; and where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible as evidence to show that the sea shore is parcel of the manor; the Court in this case holding that

¹ *A.-G. v. Jones*, 2 H. & C. 347; *Case of the Barons of Barclay*, Harg. Tracts, 34; *Calmady v. Rowe*, 6 C. B. 861.

² *In re Belfast Dock*, Ir. R., 1 Eq. 128.

³ 2 H. & C. 347; see also *Calmady v. Rowe*, 6 C. B. 861; and *In re Belfast Dock*, Ir. R., 1 Eq. 128; *Healy v. Thorne*, Ir. R., 4 C. L. 495.

⁴ 3 Exch. 413.

a grant of the *Terra or Seignory de Gower* was equivalent to the grant of a manor.

In the case of *Brew v. Haren*,¹ the Irish Court of Exchequer Chamber have held, that where lands specifically described by name adjoining a sea shore were granted, and also all and singular lands, tenements, &c. thereto belonging, &c., evidence, such as the taking of seaweed by the plaintiff immemorially, and numerous convictions obtained by the plaintiff at petty sessions of persons whom he had prosecuted for taking seaweed in the *locus in quo*, and also that he had brought a former action against an alleged trespasser, in which, after a submission to arbitration there was an award in his favour, which was made a rule of Court, was admissible as against a mere trespasser to prove that the shore passed under the grant, though the grant was not of a manor.

In *Mulholland v. Killen*,² a title to the foreshore, as it would appear, in *gross*, was held, as against a trespasser, to be supported by proof, that for sixty years the owner had let portions of it at yearly rents, had kept a bailiff to protect the seaweed, had issued regulations to govern the conduct of his tenants on the shore, and had issued licences to cut seaweed and dig gravel.

In *Chad v. Tilsed*,³ where there was a grant of wreck from Hen. II. to the Abbey of Cerna, by all their lands upon the sea, confirmed by *inspeximus* of Hen. VIII., and a subsequent grant of the island of B. and its shores, belonging to the late Abbey of C., supported by evidence that between forty and fifty years ago the owner of B. raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, it was held that although the usage of forty years could not of itself establish an exclusive right to the shore and destroy the

¹ Ir. R., 11 C. L. 198; Ir. R., 9 C. L. 41; see *Lee v. Brown*, 2 Mod. 69; Pollexfen, 410, sub nomine *Lea v. Browne*.

² Ir. R., 9 Eq. 471; *Healy v. Thorne*, Ir. R., 4 C. L. 495.

³ 5 Moore, 185.

rights of the public, yet it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words of the grant, served to establish such right.

From these cases it is clear that certain acts of ownership are admissible to prove that the foreshore is within the boundaries of a grant of land on the sea shore; what acts of ownership, however, are sufficient to establish such a claim, it is not so easy to say.

What acts of ownership sufficient to establish a claim to foreshore.

The chief proprietary acts for which the sea and sea shore seem to afford scope, appear to be:—

1. Taking wreck.
2. Taking royal fish.
3. The various incidents of a port.
4. Fishing.
5. Mining, digging, and taking sand, seaweed, &c.
6. Taking salvage for grounding of ships.
7. Embanking and inclosing.
8. Punishing purprestures or intrusions, *i. e.* trespasses.

The first three of these are not incidents to the possession of the soil, but exist independently as franchises or prerogative rights of the Crown, and cannot, according to Phear,¹ be adduced as evidence of title to the shore; this statement, however, would appear to require some modification, as in the case of *Dickens v. Shaw*,² though it was held that the right of the lord of a manor to take wreck was not sufficient alone to confer a title on him by presumption of law to the ownership of the soil, yet the Court was clearly of opinion that it might be evidence of such ownership, particularly if coupled with other acts of enjoyment.

With regard to the ownership of a several or exclusive right of fishery, as giving a right to the soil of the sea shore, in the case of *The Duke of Somerset v. Fogwell*,³ the

¹ Page 89.

pendix, 45.

² Hall on the Sea Shore, Ap-

³ 5 B. & C. 375; see also *Scratten*

Court seemed to be of opinion, that though the owner of a several fishery in tidal waters may, in an ordinary case, be presumed to be the owner of the soil, as in the case of non-tidal water, yet that a grant of such a fishery does not necessarily import the ownership of the soil. The ownership of such a fishery would, therefore, seem to be some evidence, though not conclusive evidence, of the ownership of the shore.

The remaining acts, when exercised exclusively, no doubt all tend to show ownership of the soil, but it appears doubtful whether any of them, except perhaps the last, would, singly, be sufficient to support a claim to it. The strength of the claim will, in all cases, depend on the number of exclusive acts exercised by the claimant.¹

Property in
land formed
by *alluvion*
and *dereliction*.

Land formed by *alluvion*, or gradual and imperceptible accretion from the sea, and land gained by *dereliction*, or the gradual and imperceptible retreat of the sea, belongs to the owner of the adjoining *terra firma*. Where the increase is sudden or perceptible, the land gained belongs to the Crown.² This question has been carefully considered in the case of *Rex v. Lord Yarborough*; and the judgment of the Court of King's Bench, delivered by Lord Tenterden, C. J., establishes the propositions above stated, and further defines the word "imperceptible" as meaning imperceptible in progress, and not in result,—that is to say, where the increase cannot be observed as actually going on, though a visible increase is observable every year.³ The law thus stated would appear to hold good, whether the accretion is caused by natural or arti-

v. Brown, 4 B. & C. 485; *R. v. Ellis*, 1 M. & S. 652; *Gray v. Bond*, 5 Moo. 527; Hale de Jure Maris, Harg. Tracts, 34.

¹ Phear, p. 89.

² *Rex v. Lord Yarborough*, 2 Bligh, N. C. 162; 2 Blackstone's Com. 261; Callis on Sewers, 482; Roll. Ab. 170; Dy. 326; Hale de Jure Maris, ch. iv. s. 2; Hall, p. 108; Woolrych on Waters, p. 34;

Seebkristo v. East Ind. Company, 10 Moo. P. C. 140; *Mussumat Inaum Bendi v. Hergovind Ghose*, 4 Moo. Indian App. 405.

³ *Rex v. Lord Yarborough*, 2 Bligh, N. C. 162; *Gifford v. Lord Yarborough*, 5 Bligh, 163. See also *Ford v. Lacy*, 7 H. & N. 151, and *Foster v. Wright*, 4 C. P. D. 438, as to rivers, and post, p. 62 *et seq.*

ficial causes, provided it does not arise from acts done with a view to the acquisition of the shore.¹

Where the sea, or an arm of the sea, by gradual and imperceptible progress encroaches on the land of a subject, the land thereby covered belongs to the Crown;² but where land is suddenly overflowed, and any marks remain by which its limit can be recognized, it remains to the original owner, and may be regained by art or industry; or if the sea retire again it is his as before.³ It is very doubtful whether any length of time during which lands are submerged will bar the owner's right to them when the waters have again retired.⁴

Land lost by encroachment of the sea.

With regard to islands, where the island is formed by being, as it were, torn from the mainland and surrounded by the sea, the land so surrounded continues to be the property of the former owner.⁵ Islands arising in the sea are said by Hale to belong of common right and *primâ facie* to the Crown; but where they arise in a part of the sea, or in an arm of the sea, or creek, or haven, which is the property of a subject, the islands which happen within the precincts of such private property of a subject will belong to the subject according to the limits and extent of such property.⁶

Islands.

The rule by which the right to lands gained gradually from the sea belong to the adjoining owner are thought by Lord Chelmsford⁷ not to depend on the principle "*De minimis non curat lex*," but to be those stated in the case of *The Hull and Selby Rail. Co.*⁸—viz. 1st. That that which cannot be perceived in its progress is taken to be as if it had never existed; and 2nd. The necessity for some such

¹ *A.-G. v. Chambers*, 4 De G. & J. 55. As to this see *Seebkristo v. East Ind. Co.*, 10 Moo. P. C. 159; *Blackpool Pier v. Fylde Union*, 46 L. J., M. C. 189.

² *In re Hull and Selby Rail. Co.*, 5 M. & W. 327.

³ Blackstone's Com. 262; Hale, c. iv.; Dyer, 326; Vin. Abr. Prerogative, B. a 2; Comyn's Dig. Prerog. D. 62; Callis, 51; see Hall on the Sea Shore, 108—134.

⁴ *Mussumat Inaum Bendi v. Her-govind Ghose*, 4 Moo. Ind. App. 405.

⁵ Hale, part 1, ch. vi.; Fleta, lib. 3, c. 2, s. 6; see Angell, Tide Waters, 268; Woolrych, 36.

⁶ Hale, *supra*.

⁷ *A.-G. v. Chambers*, 4 De G. & J. 68. See further as to this question, the elaborate judgment of Lindley, J., in *Foster v. Wright*, 4 C. P. D. 438, and *post*, p. 65.

⁸ 5 M. & W. 327.

rule of law for the permanent protection and adjustment of property; for it must be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of the rule; for if the sea gradually steals upon the land, he loses so much of his property.

The reason for assigning lands gained suddenly from the sea and islands to the Crown is stated by most writers to be, that the king is owner of the soil of the sea, and the universal occupant of what was unclaimed.¹

Protection
from inroads
of the sea.

The king has probably from the very earliest times had a right as part of the prerogative to defend the realm against the waste of the sea, and to order the construction of defences at the expense severally of those who are to be benefitted by them.² The power to erect a sea-wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of those things which emanate from the prerogative of the Crown for the general safety of the public; and no doubt the ordinary rights of property must give way to that which is done for the protection and safety of the public, but only to the extent to which it is necessary that private rights and public rights should be sacrificed for the larger public purposes—the general common weal of the public at large.³

Prerogative of
the Crown.

Commissions
of sewers.

We therefore find in the very earliest records that commissions of sewers were issued by the king for this purpose. The various statutes of sewers, beginning with 6 *Hen. VI. c. 5*,⁴ do but regulate the exercise of the prerogative in this respect, and prescribe forms of commissions for the ordering and execution of the necessary works, which

¹ See Hale, pp. 17, 36; Callis, 44; 2 Blackstone, 251. But, as Callis says, such islands are not within a county, and so without the realm; *Reg. v. Keyn*, 2 Ex. Div. 63. The king is not universal occupant of unclaimed dry land; *Bristowe v. Cormican*, 3 App. C. 641, per Lord Blackburn.

² Per Coleridge, C. J., in *Hudson v. Tabor*, 2 Q. B. D. 290; see

Woolrych on Sewers, pt. 1, p. 42; Callis on Sewers, p. 80; see also per Lord Coke, 10 Coke, 143; see also per Lord Holt, 12 Mod. 321; Holt's Cases, 643.

³ *Greenwich Board of Works v. Maudslay*, L. R., 5 Q. B. 397.

⁴ The most important are—23 *Hen. VIII. c. 5*; 13 *Eliz. c. 9*; 3 & 4 *Will. IV. c. 22*; 24 & 25 *Vict. c. 133*. See also *post*, Ch. VII.

forms have been from time to time varied. In early times, probably, the king ordered the construction of such sea walls as he judged necessary, very much according to his own discretion. In process of time, however, this discretion came to be limited by established rules, and at last by statute. The Statute of Sewers, 23 *Hen. VIII. c. 5*, is the most important of these. By it commissions of sewers were to be issued from time to time as need required,¹ and their powers and duties were confined to the particular districts issued in each particular commission, which formerly only lasted for three years. But now, by 24 & 25 *Vict. c. 133*, a commission of sewers once issued shall be deemed to continue until such time as it shall be superseded by her Majesty, who may from time to time fill up any vacancies therein under her sign manual.

The Commissioners of Sewers were required by 23 *Hen. VIII.*, in the first place, to make a survey of the various defences against the sea, and obstructions to navigation or the flow of rivers, and to hear and determine concerning the same, through whose default such defences were out of repair, or such obstruction caused, and to ascertain the names of the owners of the various lands where offences have occurred, and also of such as have suffered inconvenience. They were empowered to assess the lands of all individuals in their district, whether damaged or not, for repairs which they are directed to execute, and to take labourers, carriages, timber, and other necessities, on paying a reasonable price. They are empowered to make such orders, ordinances, and decrees as may be expedient, and by the judicial authority with which they are invested they may sit in judgment upon their own orders, subject, however, to the correction of the higher Courts. They may issue writs and precepts to the sheriffs, bailiffs, and others, and may punish by distress, fine, and, in some cases, by imprisonment, anyone showing negligence or disobeying their orders.² Their powers are confined to

Powers and
duties of
Commis-
sioners of
Sewers.

¹ See Woolrych on Sewers, pp. 8, 9.

² *Ib.* pp. 54—62.

the sea, and to navigable rivers, and to public sewers, and to things which interfere with the public convenience.¹

Property in
embankments
or walls
erected not
vested in
them.

The authority to be exercised by the Commissioners of Sewers on the behalf of the public, does not, however, vest in them such a property in the embankments or walls which they have erected, as will enable them to maintain an action of trespass against a trespasser for breaking them down,—the remedy must be by indictment in the name of the king.² It has further been held that there is nothing inconsistent with the purposes of a sea or river wall or embankment, erected to protect the neighbouring lands, in a public right of way along the surface; and that the same evidence of user will raise the presumption of a dedication of a right of way by the owner of the soil in the case of such embankment, as in any other case of uninterrupted and open user by the public; but that, if it was necessary for public purposes or for the public safety of a district that the level of the wall should be altered, so as to interfere with and obstruct the public right of way, the right of way must yield to the larger and more important purpose for which the powers of the Commissioners of Sewers were given.³

Their powers
limited to
parts of the
coast not
vested in
any conser-
vators or har-
bour trustees.

The navigable rivers, ports, harbours and docks of the kingdom are now almost universally vested in corporate bodies of conservators, who have all the powers of permanent Commissioners of Sewers, unless there is stipulation to the contrary in their particular act.⁴ The powers, therefore, of Commissioners of Sewers at the present day are restricted to those parts of the coast not under the regulation of any body of conservators or trustees of ports, harbours or docks.

Liability to
repair not
enforceable

Though it has been said that it was the duty of the king to guard and protect the shores and lands adjoining

¹ Woolrych on Sewers, p. 68; per Buller, J., in *Jean v. Holland*, 2 T. R. 365.

² *Duke of Newcastle v. Clark*, 1 Moore, R. 666; see *Driver v.*

Simpson, Ib. note on p. 682.

³ *Greenwich Board of Works v. Maudslay*, L. R., 5 Q. B. 397.

⁴ Woolrych on Sewers, p. 49.

the sea from being overflowed by the sea, there is no liability in this respect which can be enforced against the king, and no mode of enforcing it.¹ There is also no liability at common law apart from prescription upon a frontager to maintain a sea-wall for the protection of his neighbours; nor is the fact that a frontager had always maintained a wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbour's land, sufficient evidence to establish a prescriptive liability on a frontager to maintain the wall for the protection of the adjoining landowners.²

But there exists in the Crown a prerogative right and a duty to protect the lands of the realm from the inroads of the sea for the benefit of the commonwealth; and such prerogative right and duty import a right in an owner of land protected from the sea by a natural barrier to have such barrier preserved from destruction by the owner of the land on which it exists; and this right, though not enforceable against the Crown, is enforceable against a subject who is the owner of land on which such natural barrier exists. Thus in *A.-G. v. Tomline*,³ the plaintiff and relator, the Secretary of State for War, was seised in trust for the Crown of a piece of land near the shore of the estuary of a tidal river. The defendant was lord of the manor and owner of the adjoining land and foreshore lying between the plaintiff's land and the estuary. On the shore on the defendant's land was a natural bank of shingle formed by the sea. The defendant and his predecessors had for many years sold large quantities of shingle, and in consequence of this removal the plaintiff's property was overflowed by a very high tide in 1877, and its safety became endangered. On information and action to restrain defendant from removing any shingle so as to endanger the plaintiff's land, Fry, J., granted the injunction.

against the Crown or at common law against a frontager.

But the Crown may prevent destruction of natural barriers.

A.-G. v. Tomline.

¹ *Hudson v. Tabor*, 2 Q. B. D. 290.

² *Ib.*

³ 40 L. T., N. S. 775.

tion prayed, and based his judgment on the ground of the duty of the Crown to protect the land of the subject, and on the absurdity which would result if the subject was allowed to destroy what the Crown is bound to maintain; and, remarking on the case of *Hudson v. Tabor*, he admits that a great distinction may exist between a liability to repair an artificial bank or wall, and the right to destroy a natural protection.¹

Liability to
repair may be
imposed by
prescription.

By prescription, however, the liability to repair a sea-wall and to defray all the expenses may be imposed upon an individual owner. If the injury to a sea-wall is occasioned by the default of him who is bound to repair it and is not irremediable, and he cannot repair it, every one charged with the repairs may have an action on the case against him.² If the injury is caused by a sudden tempest without any default on his part, then the Commissioners of Sewers may order a new one, even in a different form if necessary, to be erected at the expense of all the owners of land who would be damaged by the nuisance, or may be benefitted by the repair, according to the quantity of their lands.³ At common law the king might issue commissions to repair ancient walls, but not to build new ones. If a man would make a new wall, he must sue an *ad quod damnum* to know what damage it shall be to the king and others. By stat. 23 *Hen. VIII.* new inventions are not warranted, but some alterations might be made; when an old wall by violence of the sea is broken down, another wall in the case of inevitable necessity may be made, but if the damage may be avoided by the reparation of the old one, a new one ought not to be erected.⁴

¹ His lordship rather doubts whether an action would have lain for the acts complained of otherwise than at the suit of the Attorney-General by virtue of the royal prerogative, but the decision of Hall, V.-C., in *Crompton v. Lee* (31 L. T., N. S. 469), with regard to excavations endangering inun-

dation from a river, would seem to apply *à fortiori* to the sea. As to this, see also *post*, Ch. III.

² *Keighley's case*, 10 Coke, 139.

³ *R. v. Commissioners of Sewers for Somerset*, 8 T. R. 312; *Keighley's case*, 10 Coke, 139.

⁴ *Isle of Ely case*, 10 Coke, 140; *Rooke's case*, 5 Coke, 99.

The landowners of a level cannot, however, be called upon to contribute to the repairs of a sea-wall, although it has been injured by an extraordinarily high tide and tempest, unless the damage has been sustained without the default of the party generally bound to repair.¹ A landowner may, moreover, be bound by prescription to repair a sea-wall, even though it be destroyed by an extraordinary tempest, and it is a question for the jury whether he is bound to provide against the effects of ordinary tempests only or of extraordinary ones also.²

Even when damage is caused by extraordinary tempest.

Where an obligation is imposed on a frontager, either at common law or by statute, to keep a wall at a certain height, and he fails to do so, he is guilty of negligence and responsible for all damage caused by such negligence, even though the damage is caused by the overflow of an extraordinarily high tide. Thus, in *The Nitro-Phosphate Co. v. London Docks*,³ the defendants, the owners of a dock on the river Thames, were, prior to 1875, required by the Dagenham and Havering Commissioners of Sewers to maintain a river-wall in front of their land at a height of four feet two inches above Trinity high water mark. They were authorized by Act of Parliament to make and maintain a dock and works according to levels defined in plans and sections deposited with the clerk of the peace. The sections showed the retaining banks of the new works to be of a uniform height of four feet above Trinity high water mark. The defendants allowed their retaining bank to be at one point several inches below the level of four feet. In November, 1875, an extraordinarily high tide, which rose to four feet five inches above Trinity high water mark, overflowed the defendants' bank and damaged the plaintiffs, adjoining landowners. The tide had never been known to rise so high before. In an action for damages

Negligence.

Nitro-Phosphate Co. v. London Docks.

¹ *R. v. Commissioners of Sewers for Essex*, 1 B. & C. 477. *Wear Commissioners v. Adamson*, 2 App. C. 750.

² *R. v. Leigh*, 10 A. & E. 398; and see per Cairns, L. C., in *River* ³ 9 Ch. Div. 503; 37 L. T., N. S. 330.

the defendants urged that they were not liable, as the extraordinarily high tide was the act of God, and that, even if they were liable for some damages for not keeping the wall of the height of four feet, they were not liable for the whole damage caused by a tide which rose to four feet five inches, which would have overflowed the plaintiffs' premises even if they, the defendants, had maintained their wall at the proper height. Fry, J., held, that a duty was imposed on the defendants by the Act of Parliament to keep their wall at a uniform height of four feet above Trinity high water mark; that they had failed to do so, and were guilty of negligence, and liable for the whole of the damage; and that though the unprecedented high tide might be the act of God, yet no man who has a duty cast on him, and who does not perform it, can rely upon the act of God as any excuse at all. He held, further, that as he could not tell whether any of the damage did accrue from the act of God, and could not analyze the total amount of damage between the defendants' negligence and the act of God, the defendants must pay the whole damage done.¹

On appeal² the Lords Justices affirmed the decree of Fry, J., with a variation. They held, that, independently of the Act of Parliament, the defendants were bound at common law to maintain their bank up to the level of four feet two inches, the height of the rest of the river wall, and were liable to the plaintiffs for negligence in not doing so; that the extraordinarily high tide in question, though the act of God, did not excuse the defendants from their liability, but that they ought to have an opportunity of showing that the damage done by the act of God and the damage occasioned by their negligence could be ascertained and apportioned.³

¹ *Nitro-Phosphate Co. v. London Docks*, 37 L. T., N. S. 330.

² 9 Ch. D. 921.

³ As to the "act of God," see

River Wear Commissioners v. Adamson, L. R., 2 App. C. 780; *Nicholls v. Marsland*, 2 Ex. Div. 1; and *post*, Ch. III.

If a tenant for life suffer a sea-wall to be out of repair, so that by his fault the land is drowned, it is waste in him ; but if the land be drowned by the rage and extraordinary violence of the sea, it is not waste.¹ A mortgagee not in actual possession, but in receipt of rents and profits of land charged with the repair of a sea-bank, is liable for default of reparation, although notice has not been given him to repair under 3 & 4 *Will. IV. c. 22, s. 15*, as the power given by the old statute 23 *Hen. VIII.* to assess and impose fines and pecuniary impositions still exists, although the statute 3 & 4 *Will. IV. c. 22, s. 15*, enacts that after notice given the commissioners may in default repair themselves at the defaulter's expense.²

According to the terms of the commission set out in 23 *Hen. VIII. c. 5, s. 3*, before an order can be made upon a person to repair sea-wall, there must be a presentment by a jury that he is the person by whose default the sea-wall is out of repair.³ *Stat. 3 & 4 Will. IV. c. 22*, to a certain extent modifies that enactment, because, whereas under the old statute it was necessary that the jury should find on each occasion who was liable to do repairs, the later statute enacts that it shall no longer be necessary *during the continuance of the same commission* to have a presentment of a jury upon subsequent wants of repair, and that the first presentment of any given individual, or body politic, shall be sufficient. It says that not only an individual once presented, but the owners and occupiers for the time being of such lauds, shall continue liable from time to time to repair the defence according to the presentment. But when it empowers the commissioners to make their order it only mentions such person, body politic or corporate, *i.e.* the person or body politic originally presented. It was held, therefore, that an order on

Liability of
tenants for
life and
mortgagees.

Presentment
by a jury
necessary.

¹ *Griffith's case*, Moore, Rep. 62.

³ *Wingate v. Waite*, 6 M. & W.

² *Reg. v. Baker*, L. R., 2 Q. B. 621.

739; *Reg. v. Wharton*, 2 B. & S. 719.

an owner to whom the land had been transferred since the presentment was bad.¹

The commissioners may proceed to order repairs under a commission and presentment of a jury on their own view (or by survey,—that is, upon their own view),—or assisted by measurement and by conference with competent persons, whom they may call in, or by view and survey combined, or possibly on the report of a surveyor appointed for the purpose; but the information of a marsh bailiff and the expeditor and another seems not sufficient to justify an order to repair.²

In absence of prescription all owners and occupiers benefitted liable to be rated for repairs.

In the absence of any prescriptive liability on any individual, all the owners and occupiers benefitted by the wall, and they alone, are liable to be rated to its repair.³ Where five owners of lands below the sea level covenanted with each other that a certain sea-wall should be repaired at the expense of the estates to be borne rateably, a purchaser of one part of the estate who had no actual notice of the covenant was held liable to contribute to its maintenance on the following grounds:—1st. The covenant ran with the land; 2nd. The defendant was bound to inquire how the wall was kept up, as it was manifest that the land, when he bought it, was protected by the sea-wall in question; 3rd. That as defendant was protected by the sea-wall, he was liable at common law to contribute to its support, unless he could prove he was not so liable.⁴

Necessary defences may be erected though injurious to adjoining owners.

All owners of land exposed to the inroads of the sea, or commissioners of sewers acting for a number of landowners, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to

¹ *Reg. v. Wharton*, 2 B. & S. 719.

² *Ib.*, per Cockburn, C. J., and Crompton, J.; Callis, p. 107.

³ *Keighley's case*, 10 Coke, 130; *Isle of Ely case*, 10 Coke, 140; *Rooke's case*, 5 Coke, 99. In *Rex v. Inhabitants of Paul*, 2 Moo. & Rob. 307, it was held, at nisi prius by Maule, J., that a parish

cannot be indicted for not rebuilding a sea-wall over which an alleged highway used to pass; for it could not be said to have been at the time of the default a highway which the public were prevented from using for want of reparation.

⁴ *Morland v. Cooke*, L. R., 6 Eq. 252.

others, and they will not be liable to pay compensation for injury to lands not within the level in the absence of negligence or malice.¹ It does not appear that the Court in the last-cited case meant to lay down the principle that a riparian owner has a right as against the Crown to erect defences against the sea on the shore below low water mark when the shore is the property of the Crown, and so to justify a *purpresture*; this right would seem confined to the soil above high water mark, which is *prima facie* his own. The question did not arise in the case, as the works were executed by the commissioners of sewers, and the action was by an adjoining landowner for damage done to his land by the works.

The ownership of the Crown in the soil of the shore is subservient to the public right of navigation, and cannot be used in any way so as to derogate from and interfere with such right. The grantees of the Crown take subject to this right, and any grant to a subject so as to be detrimental to the public right is void as to such parts as are open to such objections, if acted upon so as to effect nuisance by working injury to the public right.² All such nuisances may be abated on information.³ The right of navigation extends over every part of a navigable river, and *a fortiori* of the sea,⁴ and includes the right to anchor without paying toll as a necessary part of the right which is essential for its full enjoyment.⁵

This right of passage has been said not to extend to the right of crossing the shore at low water, for the purpose of landing goods, or fishing, where the shore is the property of a subject, in the absence of necessity or of a prescriptive right to do so;⁶ but it seems improbable that such a

¹ *R. v. Commissioners of Sewers of Pagham Level*, 2 B. & C. 355. This would not seem to hold good in tidal rivers; see *A.-G. v. Lonsdale*, L. R., 7 Eq. 387.

² *A.-G. v. Parmeter*, 10 Price, 378, 412; *Gann v. Free Fishers of*

Whitstable, 11 H. L. 192; *A.-G. v. Burridge*, 10 Price, 350.

³ *A.-G. v. Richards*, 2 Anst. 603.

⁴ *R. v. Ward*, 4 Atk. 384.

⁵ *Gann v. Free Fishers of Whitstable*, 11 H. L. 208.

⁶ *Blundell v. Catterall*, 5 B. & Ad. 268.

Mayor of Colchester v. Brooke.

doctrine would now be supported by the Courts, and, in fact, decisions have been given in modern cases which virtually overrule this dictum. Thus it has been held that the right of navigation includes all such rights as are necessary for the full enjoyment, not only of the right of passage,¹ but of the rights of trade and commerce;² and that the private property of the Crown and its grantees is in every way subservient to this public right.³ In the case of *The Mayor of Colchester v. Brooke*,⁴ it was held that the right of passage in a river exists at all times and states of the tide, and that it is no excess of this right if a vessel, which cannot reach its destination at a single tide, remains aground till the tide serves. Lord Denman, C. J., delivering the judgment of the Court of Queen's Bench, says, "Now if, in such rivers (*i. e.* navigable tidal rivers), "it was held that the character did not extend higher up "than the water sufficed to float vessels at all times, or "was suspended during such periods of the tide as left "the channel too shallow for that purpose, rights of the "public invaluable and immemorial in numerous rivers "would be abridged and rendered in many particulars "vexatiously uncertain, and in many cases be made "nearly, if not entirely, useless. . . . To say, then, "that the river ceased to be navigable, ceased to be a "highway, at the ebb or other states of the tide when such "vessels could not float, is in effect to say, that except for "a short period of every month, they should not use the "river at all for the purpose of trading with Colchester. "It is more reasonable to hold that the term navigable is "a relative and comprehensive term, containing within it "all such rights upon the waterway as, with relation to "the circumstances, are necessary for the full and convenient passage of vessels and boats along the channel.

¹ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

² *Rex v. Russell*, 6 B. & C. 566; *Original Hartlepool Colliers v. Gibb*, 1 Ch. D. 713.

³ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *A.-G. v. Parmeter*, 10 Price, 378; *A.-G. v. Burridge*, 10 Price, 350; *A.-G. v. Johnson*, 2 Wils. 87.

⁴ 7 Q. B. 373.

“ . . . The right of soil in arms of the sea and public
 “ navigable rivers, which the Crown *primâ facie* has,
 “ independently of any ownership in the adjoining lands,
 “ must be, in all cases, considered as subject to the public
 “ right of passage, however acquired; and any grantee of
 “ the Crown must of course take subject to such right.”

In the case of *Marshall v. Ulleswater Company*,¹ it was held that persons having a right to navigate on a non-tidal lake were entitled to pass over a pier belonging to the plaintiff, the owner of the soil of the bed of the lake, which had been wrongfully erected by a third party, but was maintained by the plaintiff, and which prevented persons having a right of access from coming down to the brink of the lake, for the purposes of going on it to exercise the public right of navigation. In delivering the judgment of the Court, Blackburn, J., says, “It
 “ is well established law, that where there is a public
 “ highway, the owners of land have a right to go upon
 “ the highway from any spot on their own land. They
 “ cannot, of course, pass over the soil of another without
 “ his leave, and he who has dedicated the roads to the
 “ public at large has no right to complain that a parti-
 “ cular individual has come upon it at one spot, rather
 “ than at another; consequently every person in the vicinity
 “ of Ulleswater, where land abuts on the edge of the lake,
 “ has a right to come down to the brink of the water for
 “ the purpose of going upon it to exercise the public right
 “ of navigation where it is admitted to exist. Now I
 “ apprehend that where there is a right of that kind, the
 “ necessary incidents are involved in it, and therefore, that
 “ in a navigable river like the Thames where a person
 “ with his barge has come to the land, it is not essential
 “ that he should find some spot where the water is so deep
 “ that the barge can float up to the bank close enough to en-
 “ able him to step ashore, but that he has the reasonable and
 “ usual modes of disembarking incidental to the navigation

Marshall v.
Ulleswater
Company.

¹ L. R., 7 Q. B. 166.

“ of vessels ; if the water were a few feet in depth he would
 “ probably use a boat, if very shallow he could wade, or if
 “ his vessel lay conveniently near, he might place a plank
 “ across it to the land ; and, therefore, the rule of law is that
 “ the owner of the adjoining land, or those whom he per-
 “ mits to go thereon, have a right of access to and from
 “ their vessels either by walking, or wading, or walking
 “ over a plank, but that they have no right to disturb the
 “ soil covered with water, as by permanently fixing
 “ anchors.”¹ Though this, strictly speaking, would only
 apply to the sea shore and tidal rivers when the tide was
 high, it is submitted that as the principle of the decision
 is rested on the necessity of the right of passage over the
 soil of another for the full enjoyment of the right of navi-
 gation ; and as the right of navigation exists at all times
 and states of the tide,² it would be absurd to draw a dis-
 tinction and limit the right of passage over the shore to
 the period when it was covered with water, and hold such
 passage illegal (in the absence of a prescriptive right) when
 the shore was dry.³

Public right
 of fishery.

The right of fishing in the sea and upon the shore
 between high and low water mark is *prima facie* vested in
 all the subjects of the realm as a common right.⁴

But in some cases statute law has set bounds to the
 exercise of this right in respect of seasons, particular
 kinds of fish, and the manner of fishing.

The right of the public to fish includes the right to take
 shell fish on the sea shore between high and low water
 mark.⁵ It seems doubtful whether it includes the taking
 of shells.⁵ It may be carried on by the use of lawful

¹ L. R., 9 Q. B. 172.

² *Mayor of Colchester v. Brooke*, 7 Q. B. 889.

³ See also *South Eastern Rail. Co. v. Dorling*, 5 C. B., N. S. 821 ; *A.-G. v. Conservators of the Thames*, 1 Hem. & M. p. 32, per Wood, V.C.

⁴ *Fitzwalter's case*, 1 Mod. 105 ;

Anonymous, 6 Mod. 73 ; *Warren v. Mathews*, 1 Salk. 357 ; 6 Mod. 73 ; *Smith v. Kemp*, 2 Salk. 637 ; *Ward v. Cresswell*, Willes, 265 ; *Bagot v. Orr*, 2 Bos. & Pul. 472 ; *Carter v. Murecott*, 4 Burr. 2163 ; *Mayor of Oxford v. Richardson*, 4 T. R. 437.

⁵ *Bagot v. Orr*, 2 Bos. & Pul. 472.

nets.¹ This right is subservient to the right of navigation.²

Prior to *Magna Charta* the Crown had power to exclude the public from this right and to grant, a several and exclusive right, of fishing to individual subjects. This right cannot now be granted by the Crown, and a several fishery in the sea can now only be claimed by prescription, or ancient usage presupposing a grant, or by express grant from the Crown prior to *Magna Charta*.³ The right of several fishery is independent of the ownership of the soil of the shore by the subject, and may exist either with or without such ownership. A grant, therefore, of the shore alone will not pass the fishery, which will remain in the public;⁴ nor, it seems, will a grant of a several fishery pass the soil,⁵ though it may be evidence, coupled with the grant of a manor, that the soil was intended to pass.⁶

By general law all goods found afloat and derelict Wreck. belong to the king in his office of Lord High Admiral.⁷ The right to take wreck is not claimed by the Crown as part of or appurtenant to the ownership of the sea shore, but in virtue of the royal prerogative.⁸ The right to take wreck on the shore may be granted to a subject apart from the shore itself, but it frequently exists as a franchise attached to a manor on the sea coast, though in such cases it is still prescribed for on the ground of immemorial usage or proved by express grant.⁹

A grant of the shore alone does not, therefore, pass the right of wreck, nor does a grant of wreck alone pass the

¹ *Warren v. Matthews*, 6 Mod. 73; 1 Salk. 357.

² *A.-G. v. Parmeter*, 10 Price, 378; *A.-G. v. Johnson*, 2 Wils. 87.

³ *Carter v. Murcott*, 4 Burr. 2163; Hale, ch. 5; *Warren v. Matthews*, 1 Salk. 357; *Malcolmson v. O'Dea*, 10 H. L. 593; *Allen v. Donnelly*, 5 Ir. C. L. R. 292; *O'Neill v. Allen*, 9 Ir. C. L. R. 132; Kent's Com. 489; Hall, 46; Woolrych on Waters, c. 5, p. 75.

⁴ Per Hale, C. J., *Fitzwalter's*

case, 1 Mod. 105.

⁵ *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

⁶ For a full account of the right of fishery and the incidents thereto, see *post*, Ch. VI.

⁷ *Rex v. 49 Casks of Brandy*, 3 Hagg. 270.

⁸ Hall on Sea Shore, p. 44; Bracton, 2; Vent. 188; 5 Coke, 108; *Sutton v. Buck*, 2 Taunt. 355.

⁹ See *Talbot v. Lewis*, 6 C. & P. 606.

shore, though it may be called in as evidence in support of a claim to the shore.¹ The right to wreck will not pass by the general words of a grant.² The right to take wreck implies a right of crossing the shore for the purpose of taking it.³

What is
wreck.

By the stat. of *West. I. c. 4*, it is provided that no ship or anything in it shall be adjudged wreck where any man or domestic animal escape alive.⁴ In such cases the goods are to be saved and kept by the coroner, sheriff, or king's bailiff: the owner may claim them within a year and a day: if he does not so claim them, they are to be delivered to the officers of the Crown.⁵ Where goods are perishable, they may be sold sooner, to prevent loss.⁶ Where wreck belongs to another than the king, he is to have them in the same way. *Flotsam*,⁷ *jetsam*,⁸ and *ligan*⁹ being on the land pass by grant of wreck, but this only when the ship perishes, or the owner of goods is not known; and goods cast into the sea for fear of tempest are not forfeited unless the ship be lost.¹⁰

Further, to constitute wreck of the sea which will pass by grant to a subject, not only must there be no life saved, and no vestige remaining by which the property can be identified, but the goods must be cast or left on land by the sea¹¹ touching the ground,¹² though they need not have been left dry.¹¹

A log of wood floating in the sea near the shore, and drawn on a rock by a person wading, and another log which having been cast on the beach and marked by the grantee of wreck, and then carried out to sea again and taken the second time while floating, were both held in a late case to be *droits* of the Admiralty, and not to belong

¹ As to this, see *Dickens v. Shaw*, Hall on Sea Shore, Appendix, 45.

² *Alcock v. Cooke*, 2 M. & P. 625.

³ 6 Mod. 149, *Anon.*

⁴ See *Hamilton v. Davis*, 5 Burr. 2732.

⁵ Woolrych, 12; Phear, 99; see *Sutton v. Buck*, 2 Taunt. 302.

⁶ 2 Inst. 168.

⁷ When the ship sinks and goods

float. (5 Coke, 106.)

⁸ Where the goods are thrown overboard to lighten the ship and the ship perishes. (Ib.)

⁹ Heavy goods cast in the sea and buoyed up by corks. (Ib.)

¹⁰ 46 Edw. III. c. 15.

¹¹ *Rex v. 49 Casks of Brandy*, 3 Hagg. 257; 1 Hen. IV. c. 16.

¹² *The Pauline*, 2 Rob. Adm. 358.

to the grantee of wreck on the coast.¹ The grantee of wreck has, however, a special property in all goods stranded in his liberty, and may maintain trespass against a wrongdoer for taking them away, though such goods were part of a cargo of a ship from which some persons had escaped alive, and though the owners within the prescribed time identified them, and before any seizure had been made by the grantee.²

To constitute wreck under the *Merchant Shipping Act*, 17 & 18 *Vict. c.* 104, and to entitle the finders to salvage, the goods must have been to sea in a ship; and timber which had drifted from the place where it had been moored is not wreck within the Act.³ They must also have been wrecked—*i. e.* cast on the shore, for goods landed from a ship which was abandoned and driven on shore are not wreck within 3 & 4 *Wm. IV. c.* 52, s. 50, so as to be liable to pay under that statute.⁴

It has been held that between high and low water mark when the tide is high the Court of Admiralty has jurisdiction over wreck, and when it is low the Courts of Common Law; Sir J. Nicholls thus stating the law:—"Above high water mark it [wreck] belongs to the lord of the manor as grantee of the Crown; beyond low water mark he can have no claim; it is on the high seas, and belongs to the Admiralty. It is equally clear that between high and low water mark it is *divisum imperium*; when the tide covers this space it is sea, when it recedes again it is land, and within the jurisdiction of the manor."⁵

Jurisdiction
of Courts of
Admiralty
and Common
Law.

Spanish dollars one hundred years old found on the shore must be presumed to have come from a vessel which had been wrecked, though no part of the vessel is found.⁶

¹ *Stackpoole v. The Queen*, Ir. R., 9 Eq. 119.

² *Bailiff of Dunwich v. Sterry*, 1 B. & A. 831.

³ *Palmer v. Rouse*, 3 H. & N. 505.

⁴ *Legge v. Boyd*, 1 C. B. 92; see *Clark v. Chamberlain*, 2 M. & W. 78. As to customs duty, see *Barry*

v. Arnaud, 10 A. & E. 646.

⁵ *R. v. Two Casks of Tallow*, 2 Hagg. 294; *The Pauline*, 2 Rob. Ad. 358; see however *Embleton v. Brown*, 3 E. & E. 234; and *Reg. v. Musson*, 3 E. & B. 800, as to criminal jurisdiction, and 31 & 32 *Vict. c.* 122.

⁶ *Talbot v. Lewis*, 6 C. & P. 630.

Royal fish.

Royal fish—*i. e.* whale, sturgeon and porpoise,—whether thrown on the shore or caught on the sea within the realm, are the property of the Crown and not of the finder. They may be the property of a subject by grant or prescription in the same way as wreck.¹

Bathing.

Bathing in the open sea and in tidal rivers has been held by the Court of King's Bench, by a divided opinion, not to be a common law right, so as to justify the public in passing over those parts of the shore which are private property, in order to gain access to the water for that purpose.² The plaintiff in this case was lord of the manor and owner of the shore by grant from the Crown, on the river Mersey, an arm of the sea, and had also the exclusive right of fishing on the shore with stake nets. The defendant was servant of an innkeeper on the shore, who kept bathing machines, and he drove the machines across the shore to the water. No prescriptive right was claimed for the passage of machines, though it was proved to be the custom for people to pass on foot for the purpose of bathing. The defendant claimed a common law right for all the King's subjects to bathe in the sea, and to cross the shore for that purpose on foot, and with horses and carriages. Best, J., took the defendant's view of the case, on the broad ground of the sea being the great highway of the world, of the importance of a free access to the sea, and of a necessity of a right to bathe in the sea as essential to the health of so many persons; but the majority of the Court, Abbott, C. J., Holroyd and Bayley, JJ., held that there was no such common law right, and that in the absence of prescription the plaintiff was entitled to recover for the trespass.³ This decision is protested against by Mr. Hall, in his *Essay on the Sea Shore*, on the ground that the custom of bathing is as ancient and general a custom as that of fishing in the

¹ Hall on the Sea Shore, 80; Stephen's Blackstone, vol. ii. p. 540, 7th ed. See Paterson's Fishery Laws, 24, 165; Woolrych on Waters, 83.

² *Blundell v. Catteral*, 5 B. & Ad. 268.

³ See Angell on Tidal Waters, 28.

sea; and that, therefore, the rights of private property should be subservient to this public right, in the same way as they are to the right of fishing.¹

It would appear that the only restraint which by the common law is imposed upon the common liberty of bathing in the sea and tide waters, where no right of private property is involved, is that which is imposed by decency and a respect for public morals. The laws of decency must be enforced in all places which become the habitations of civilized man.² Hence it has been held that it is an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he may be distinctly seen, although the houses may have been recently erected, and although it may have been usual up till then for men to bathe in great numbers at the place in question.³

It has been held in a later case that where the shore is held by lease from the Crown, an immemorial custom of bathing along the shore gives no right to persons availing themselves of it to place machines there, whether drawn by horses or by means of a capstan; and that a prohibition in a provisional order under an Act of Parliament to bathe without a machine, does not operate to confer a right to place a machine on such land for the purpose of bathing.⁴

Sand, shells, and seaweed, being natural products of the shore, belong, it would seem, *prima facie* to the Crown or its grantees;⁵ and there is no general right in the public to enter the shore and take them.⁶ When, however, the soil is in the Crown, it is to be presumed that the taking of them would be permitted if it was not injurious to the navigation.⁷ A lord of a manor cannot claim an exclusive

Rights to
sand, shells
and seaweed.

¹ Hall, 156 — 186; Angell on Tidal Waters, 28.

² Angell, 34.

³ *Rex v. Crunden*, 2 Camp. 89.

⁴ *Mace v. Philcox*, 15 C. B., N. S. 600.

⁵ See per Best, J., in *Blundell v. Catterall*; *Howe v. Stowell*, 1 Al.

& Nap. 356, and note at p. 357; Angell on Tidal Waters, 260.

⁶ *Howe v. Stowell*, 1 Al. & Nap. 356; *Bagot v. Orr*, 2 Bos. & Pul. 472.

⁷ Per Best, J., in *Dickens v. Shaw*, Hall on the Sea Shore, App. 68.

right to cut seaweed *below low water* mark except by grant or prescription from the Crown.¹ Seaweed thrown on the land by extraordinary tides belongs to the owner of the property on which it is thrown;² so does sand drifted by the wind.³

By prescrip-
tion.

A right to take sand and shingle may exist and be claimed by prescription. As such a claim is, however, the claim to a *profit à prendre* in the soil of another, it cannot be supported by proof of a *custom* in the inhabitants of a township; for such a custom would be void, as a *profit à prendre* can only be claimed by grant or prescription. Nor could it be claimed by such inhabitants by prescription, as it was a claim by persons not a corporation, and thus incapable of taking by grant; and, moreover, was not claimed by them in a *que estate*.⁴ Where, however, the custom was for the good of the navigation, a custom for the freemen of an ancient borough and the proprietors of ships to dig gravel was held good.⁵

A claim of this kind may, however, be supported by prescription by an individual through his ancestors, or in the name of a corporation and its predecessors, or as appurtenant to some estate holden by the claimant.⁶

By 7 *Jac. I. c. 18*, the taking of sand from the shore for agricultural purposes by the inhabitants of Cornwall and Devon is made lawful; but whether this was in confirmation of a prior custom so to do seems doubtful.⁷

Ports and Harbours.

Definition.

A harbour or haven is a place naturally or artificially made for the safe riding of ships.⁸ A port is a haven,

¹ *Benest v. Pipon*, 1 Knapp, P.C. 60.

² *Lowe v. Govett*, 3 B. & Ad. 863; *Baird v. Fortune*, 7 Jur., N. S. 926, per Lord Campbell, C. J.

³ *Blewett v. Tregonning*, 3 A. & E. 554.

⁴ *Constable v. Nicholson*, 14 C. B., N. S. 230; *Pitts v. Kingsbridge*, 19 W. R. 884; see also *Bland v. Lipscombe*, 24 L. J., Q. B. 155, n.; *Race v. Ward*, ib.; *Allgood v. Gib-*

son, 34 L. T., N. S. 883; *A.-G. v. Mathias*, 27 L. J., Ch. 761; *Gateward's case*, Cro. Jac. 152.

⁵ *Mayor of Lynn v. Tayler*, 3 Lev. 160.

⁶ Angell on Tidal Waters, 273; *Constable v. Nicholson*, 14 C. B., N. S. 230.

⁷ See Hall on the Sea Shore, 95; Hale de Jure Maris, c. 6.

⁸ Hale de Portibus Maris, c. 2.

and something more; it is a harbour where customs officers are established, and where goods are either imported or exported to foreign countries.¹ All ports comprehend a city or borough called *caput portus*, with a market and accommodation for sailors.²

The privilege of erecting ports at which customable goods may be landed, and of taking dues and tolls as incident thereto, is part of the royal prerogative, and can only belong to a subject as a franchise by grant or prescription from the Crown, or by Act of Parliament.³ No subject has therefore a right to land customable goods on his own land, or elsewhere, than at a public port. There is no restriction in the landing of goods not customable at private wharfs, even in public ports, on the taking of such tolls for landing, &c. as may be agreed upon between the parties;⁴ but no general toll can be taken at such wharfs, a right to a toll depending in all cases on grant, prescription, or Act of Parliament.

Privilege of erecting ports part of prerogative of the Crown.

The Crown may grant to a subject the right to erect a port on his own land, or on the land of another, provided, in the latter case, no vested interests are interfered with.⁵

May be granted to a subject.

The ownership of the soil of all ports, as well as of the sea shore between high and low water mark, is vested *primâ facie* in the Crown, and the Crown might formerly have conveyed the soil to a subject by grant or royal charter, either apart from or in conjunction with the franchise.⁶ Where a subject has, by grant or prescription, the franchise of a port, it would appear to be evidence that he has the soil also, though this evidence will not be conclusive, as the franchise may exist apart from the soil.⁷ A port may, it would seem, pass as parcel of a manor.⁸

Ownership of soil of ports.

¹ Hough's Navigable Rivers, 175.

² Hale de Port. Maris, c. 11.

³ Hale de Port. Maris, c. 2; Hough, 176; 2 Stephen's Blackstone, 7th ed. 499; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

⁴ Hale de Port. Maris, c. 6; Hough on Navigable Rivers, 184;

Baltimore Wharf case, 3 Bland Rep. 383 (American).

⁵ *Mayor of Exeter v. Warren*, 5 Q. B. 773.

⁶ See *ante*, pp. 15, 21.

⁷ See *ante*, p. 21.

⁸ See Hale de Port. Maris, 57; *Foreman v. Free Fishers of Whitstable*, L. R., 3 C. P. 584.

Ports now
generally
vested in
trustees.

The ports of this country are now almost exclusively the property of corporate bodies by ancient grant or charter from the Crown, or by Act of Parliament, by which the powers and duties of the trustees and the public in each particular port are regulated, and to which, in all cases of disputes, reference must be made.

Conservancy
of ports.

The Crown, in virtue of its prerogative, and of its office of Lord High Admiral, is conservator of all ports, havens, creeks, and arms of the sea, and protector of the navigation thereof.¹

Although, formerly, the King had a power of granting the franchise of havens and ports, yet he had not the power of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven, whereby the revenue of customs was much impaired and diminished by fraudulent landing in obscure corners. This abuse caused statutes to be passed, enabling the Crown to ascertain the limits of all ports, and to assign proper quays for the exclusive landing and loading of merchandize; and this duty, as well as those of appointing ports and sub-ports, and declaring the limits thereof, is now confided, by 17 & 18 *Vict. c. 107*, s. 9, to the Commissioners of her Majesty's Treasury.² By 10 & 11 *Vict. c. 27*,³ the provisions ordinarily inserted in local Acts of Parliament, passed for the construction and improvement of particular harbours, docks, and piers, are consolidated into a single statute, so as to be embodied by way of reference in any special act without needless repetition; and with the object of obviating the necessity in certain cases of obtaining at great expense a

¹ See Hale de Jure Maris, Harg. Tr. 23.

² 2 Stephen's Blackstone's Com. p. 500, 7th edit.

³ The Harbour, Docks and Piers Clauses Act, 1847, extends to such harbours, docks or piers as shall be authorized by Acts hereafter to be passed which shall declare that this Act shall be incorporated therewith (sect. 1). The Lands Clauses Con-

solidation Acts, 1845, are to apply as to the purchase of lands, and the Railways Clauses Consolidation Acts, 1845, with respect to recovery of damages. Plans are to be deposited with clerks of the peace, and approved by the Admiralty and Commissioners of Woods and Forests. Powers are also given to the undertakers to make and enforce bye-laws.

special local Act for such construction, the Board of Trade is now enabled, by 24 & 25 *Vict. c. 45*, to make provisional orders authorizing the construction of any pier, harbour, quay, wharf, jetty, or excavation by private undertakers, upon application made to the board, but such orders are of no validity or force until confirmed by Act of Parliament.¹ By 25 & 26 *Vict. c. 69*, various powers and duties relative to harbours and navigation were transferred from the Admiralty to the Board of Trade; sect. 5 of which enacts, "that with respect to any special Act that may be passed after the end of the present session of Parliament, the following sections of the Harbour, Docks, and Piers Clauses Act, 1847, and all provisions relative thereto in that Act, or in any future special Act contained, shall be construed as if the Board of Trade were named in the said sections instead of the Admiralty, viz. in sects. 12, 13, 16, 18, 19." Under sect. 9 and sched. I. of the Public Works Loans Act,² the Loan Commissioners are empowered to make loans to any person authorized for the purpose of constructing and improving docks, harbours, and piers, and any work for which the Public Works Loan Commissioners are authorized to lend by 24 & 25 *Vict. c. 47*.³ By 40 & 41 *Vict. c. 16*, the Wrecks Removal Act, harbour and conservancy authorities are empowered to remove vessels sunk, stranded, or abandoned in harbours or tidal waters, where such wreck is or is likely to become an obstruction.

The most important incident to the ownership of a port is the right to take various dues and tolls for the use of it, such as anchorage and tonnage dues which arise from the ownership of the soil of the port, or from the ownership of the franchise apart from the soil,⁴ and wharfage dues which arise generally from the ownership of the adjoining lands.⁵

Tolls and
dues

¹ 2 Stephen's Blackstone, p. 501.

² 38 & 39 *Vict. c. 89*.

³ Harbours and Passing Tolls Act, 1861.

⁴ *Hale de Port. Maris*, c. 6; *Foreman v. Free Fishers of Whit-*

stable, L. R., 4 H. L. 281.

⁵ *Hale de Port. Maris*, c. 6; *Woolrych on Waters*, p. 301; see *Sargent v. Reed*, 1 Wils. 91; *Colton v. Smith*, 1 Cowp. 47.

can only be taken by Act of Parliament or by express or implied grant from the Crown.

The right to take dues for the use of a port exists only by Act of Parliament, by express grant from the Crown, or by immemorial usage which presupposes such a grant, and from which, if uncontradicted, a grant must be presumed.¹ Thus, where by Act of Parliament the plaintiffs were authorized to make a dock, and all goods which should be landed or discharged upon any of the quays should be liable to pay the like rates of wharfage as were usually taken for goods, &c. loaded or discharged on quays in the port of London, it was held, that as the premises were only vested in the company for the purposes of the Act, they had no common law right to compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays.²

Consideration necessary to support a claim to toll.

In no case can a claim for dues and tolls be supported, unless some consideration can be shown on which to found the claim, an express grant from the Crown being void unless founded on sufficient consideration, for the creation of a toll is only a mode of paying for a public service.³ It has, however, been held that the making of a port is of itself a sufficient consideration for such a claim,⁴ even when the soil is in another.⁵ So is the right to bring ships into a port for safety, and the liberty to unload goods there.⁶

The maintaining a wharf and keeping a measure for measuring salt has, however, been held not to be sufficient to support a claim to have a bushel of salt from every ship laden with salt passing by the wharf; Hale, C. J., in that case saying, "the prescription is not for a port but for a wharf. If any man prescribe for a toll upon the sea,

¹ See *Jenkins v. Harvey*, 1 C. M. & R. 877.

² *Kingston-on-Hull Docks v. La Marche*, 8 B. & C. 42; 1 Mod. 105, per Hale, C. J.

³ *Falmouth v. George*, 5 Bing. 286; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Brett v. Beales*, 10 B. & C. 508; *Hill v. Smith*, 4 Taunt. 520; *Warren v. Prideaux*, 1 Mood. 104; *Haspurt v. Wills*, 1

Mod. 47; *Vinkenstern v. Ebdon*, 1 Ld. Raym. 384; 1 Salk. 248.

⁴ *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402.

⁵ *Mayor of Exeter v. Warren*, 5 Q. B. 773.

⁶ *Mayor of London v. Hunt*, 2 Lev. 37; *Wilkes v. Kirby*, 2 Lutw. 1519; *Woolrych on Waters*, p. 300.

“ he must allege a good consideration, because by *Magna Charta* and other statutes every one hath a liberty to go
“ and come upon the sea without impediment.”¹

No toll, therefore, can be claimed outside a port, unless some actual benefit is given as an equivalent for the payment; and a claim for toll, to be for the right of passage and anchorage, merely as incident to the ownership of the soil of the sea beyond the limits of a port, cannot be sustained,² though possibly a customary payment might be claimed in such a case for actual injury done to property, as by a grounding of a ship on an oyster bed.³ Where any actual benefit can be shown to the navigation, such as the keeping of a capstern and rope to assist boats in bad weather, a sufficient consideration exists to support a prescriptive right to take toll from all boats frequenting a cove (not within a port), whether such boats use the capstern or not, the existence of the capstern being necessary for the safety of the navigation in bad weather,⁴ and it not being necessary that the benefit conferred should be precisely that in respect of which the toll is claimed.⁵

The right to take dues and tolls implies a corresponding duty on the owner of the port to keep it in repair,⁶ and the owner of a port or dock will be liable for damage caused by his neglect in so doing, even where the tolls taken are not for his benefit, but are devoted to the maintenance of the port or dock.⁷ It is not, however, necessary for an owner of a port to show that he has actually kept the port in repair to enable him to recover the dues, the consideration for such dues not being the actual repair, but the fact of the owner being bound by custom so to repair,⁸ and it being possible that the port may never need repairs.⁹

¹ *Haspurt v. Wills*, 1 Mod. 47.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

³ *Mayor of Colechester v. Brooke*, 7 Q. B. 339.

⁴ *Falmouth v. George*, 5 Bing. 286.

⁵ See *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 285.

⁶ *Jenkins v. Harvey*, 1 C., M. &

R. 877; *Mayor of Exeter v. Warren*, 5 Q. B. 773.

⁷ *Mersey Dock Co. v. Gibb*, L. R., 1 H. L. 93; and see *post*, Ch. VII.

⁸ *Finkenstern v. Ebdon*, 1 Salk. 248; 1 Ld. Raym. 384.

⁹ *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. As to liability of a dock company for negligence of its servants, see *Mersey Dock Co. v. Gibb*,

Duty to repair.

*Foreman v.
Free Fishers of
Whitstable.*

It has further been decided in a late case that anchorage dues may be claimed in a port which is a natural roadstead and not artificially formed, although there be no obligation to repair it and keep it accessible, so as to form a consideration for the toll.¹ This last case is one of considerable importance, as in it the question of tolls was very fully considered, and it may be well to state it at some length. *The Company of Free Fishers of Whitstable*, lords of the manor of Whitstable, brought an action against one Foreman to recover tolls in respect of the anchorage of his ship within their manor below high water mark. In a former action they had claimed this toll solely as a customary payment for the use of the soil; and the House of Lords held that such a claim could not be supported, for the right of free passage and the use of the sea as a highway, including the right of anchorage, is paramount to the right of property in the soil, and cannot be interfered with, either by the Crown as owner of a manor, or by a subject to whom such ownership had been transferred.² In the present case the toll was claimed generally by the respondents as owners of the manor, and the point on which the whole question turned was whether the *locus in quo* was or was not a port. It appeared from the special case stated for the opinion of the Court, that the soil and fishery of the *locus in quo* belonged to the plaintiffs, the lords of the manor; that though there was no direct evidence that it was a port, yet tolls had been taken from time immemorial for vessels casting anchor there by the lords of the manor; that the lords had the right to wreck and toll for merchandise landed within the manor; and that they had immemorially maintained beacons and buoys, partly, however, for the protection of their oyster beds. The Court of Common Pleas held that the maintenance of the buoys and beacons, taken in connection with the ownership of the soil of the

L. R., 1 H. L. 93; and for liability to repair under statutory provisions, *Reg. v. Bristol Dock Co.*, 2 Rail. Cas. 599; *ib.* 1 Rail. Cas. 548; and *post*, Ch. VII.

¹ *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

anchorage and the benefit of the public therefrom, was sufficient consideration to support the claim for anchorage dues.¹ On appeal, the Court of Exchequer Chamber—Bramwell and Martin, BB., *diss.*—affirmed this judgment; Kelly, C. B., thus stating the grounds on which the opinion of the Court was based: “We think there is ample “evidence to justify the presumption both that there was “here by prescription an ancient port, and that before the “time of legal memory the lord of the manor, being also “owner of the fishery and soil under the sea, had consented to the formation of the port on the terms that he “should have toll on merchandize landed and anchorage “from vessels anchoring or grounding in the haven, he at “the same time agreeing to keep up the buoys, chiefly, in “all probability, for the object of protecting the oysters, “but incidentally guiding vessels to a safe anchorage. If “this was so, there was ample consideration to support the “customary payment, and we think, in order to support “an immemorial payment, we ought to make this presumption.”² The House of Lords, on appeal, unanimously affirmed the judgment, holding that, exclusive of the evidence as to buoys and beacons, there was sufficient evidence to show the former existence of a port in the *locus in quo*, from the immemorial payments of the tolls for merchandize and anchorage dues; for as anchorage dues were almost, if not universally, incident to the ownership of a port, and as every intendment should be made in favour of a payment uninterruptedly made time out of mind, they were justified in drawing the inference of fact that a port did exist, and therefore that the toll had a legal origin; and that this inference was not rebutted by the fact that the port was not artificially formed, but was a natural roadstead, imposing no obligation on the owner to repair it and keep it accessible, so as to form a consideration for the anchorage toll, for that the repair of a port was not

*Foreman v.
Free Fishers of
Whitstable.*

¹ L. R., 2 C. P. 688.

² L. R., 3 C. P. 586.

a necessary consideration for such a toll.¹ Lord Chelmsford, in his judgment, went even further than this, holding that from the immemorial payment of the anchorage toll alone, the Courts, in the absence of anything to compel them to assign a different foundation for it, were bound to presume that the lords of the manor were the owners of a port to which such a toll would be lawfully incident.²

Tolls must be reasonable.

No general toll can, as has been said, be taken in any public ports, or at any wharves which have been dedicated to the public, and at which customable goods are necessarily landed, except by grant, prescription, or Act of Parliament, founded on some corresponding benefit to the public as a *quid pro quo*. In addition to this the toll taken must be reasonable in amount, and must not be unreasonably enhanced.³ This, of course, does not refer to private wharves where the rates charged in each particular case are a matter of bargain between the parties.⁴

¹ L. R., 4 H. L. 266.

² L. R., 4 H. L. 286.

³ *Heddy v. Wheelhouse*, Cro. Eliz. 558; *Falmouth v. George*, 5 Bing. 286; Hale de Port. Mar., Harg. Tr. 78; Chitty on Prerogative, 195; Comyn's Dig. Market; Inst. 220;

see also as to tolls, *The Baltimore case*, 3 Bland, 383 (American); *Brune v. Thompson*, 4 Q. B. 513.

⁴ As to tolls generally see *post*, Ch. VIII., and as to navigation, Ch. VII.

CHAPTER II.

OF INLAND WATERCOURSES ; THE OWNERSHIP OF THE
SOIL THEREOF, AND OTHER MATTERS.

A WATERCOURSE may be defined as a body of water issuing *ex jure naturæ* from the earth, and by the same law pursuing a certain direction in a defined channel, till it forms a confluence with the sea.¹ “A spring of water, “both in law and in ordinary language, is, as I understand it,” says Jessel, M. R.,² “a natural source of “water, of a definite and well-marked extent. A stream “of water is water which runs in a defined course, so as to “be capable of diversion ; and it has been held that the “term does not include the percolation of water under- “ground.” “A spring,” says Brett, L. J.,³ “is not an “artificial space, but a natural chasm in which water has “collected, and from which it either is lost by percolation, “or rises in a defined channel.”

Definition of
a water-
course.

A watercourse, *flumen vel cursus aquæ*, has been defined by Lord Tenterden, C. J., as water flowing in a channel between banks more or less defined.⁴

Woolrych defines a river as a running stream pent in on either side with walls and banks, and it bears that name as well where the waters flow and reflow, as where they have their current one way.⁵ This definition includes, therefore, all natural streams, however small, which have a definite and permanent course, and excludes all bodies

¹ Angell on Watercourses, 2 ; Woolrych on Waters, 40 ; Woolrych on Sewers, 51 ; Phear, Rights of Water, 31.

² *Taylor v. St. Helen's*, 6 Ch. Div. 264 (C. A.).

³ *Brain v. Marfell*, 41 L. T., N. 457.

⁴ *Rex v. Inhabitants of Oxfordshire*, 1 B. & A. 301 ; Callis on Sewers, 77.

⁵ Woolrych on Waters, 40 ; Callis on Sewers, 77 ; Houck on Navigable Rivers, 1 ; Phear on Rights of Water, 31.

of water, however large, which are of a temporary character, *i. e.* which are dependent on the will or convenience of individuals for their volume or duration.¹

Subterranean
streams.

A subterranean stream may flow in such a known and defined channel as to give rise to similar rights as would exist above ground. "If," says Pollock, C. B., "the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it could never be contended that the owner of the soil under which the stream flowed, could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover, if the stream had been wholly above ground."²

Surface and
percolating
water.

The principles which regulate the rights to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to water, whether under or above ground, having no certain course or defined limits, such as that merely percolating through the strata of the earth, or that diffused over its surface, such water not being subject to the law of watercourses.³

Limits of a
watercourse.

A stream begins at the point where the water palpably rises to the surface and forms a channel,⁴ and extends till it mingles with the sea outside the body of a county.⁵

In a late case in the Exchequer it appeared that the water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring was cut off at its source, and the water was received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose. The action was for diversion by the mill-owner. The judge at the trial told the jury that the questions for them were, whether there was a

¹ *Briscoe v. Drought, Ir. R.*, 11 C. L. 264; *Arkwright v. Gell*, 5 M. & W. 203.

² *Dickenson v. Grand Junction Canal*, 7 Ex. 300; *Chasemore v. Richards*, 7 H. L. 374, per Lord Chelmsford; *Dudden v. Clutton Union*, 11 Ex. 627; 26 L. J., Ex.

146.

³ *Acton v. Blundell*, 7 M. & W. 324.

⁴ *Dudden v. Clutton Union*, 26 L. J., Ex. 146, 11 Ex. 627; *Phear*, 33.

⁵ See *Reg. v. Keyn*, 2 Ex. Div. 62.

natural or defined watercourse from the spring-head to the stream, and if so, whether the defendant had diverted water from this watercourse. Pollock, C. B., said: "The real question is, whether there is a natural watercourse which, but for the acts done by the defendant, would have conveyed water to the stream, and from thence to the mill of the plaintiff. If there is a natural spring, the waters of which flow in a natural channel, it cannot be lawfully diverted by anyone to the injury of the riparian proprietors. The law of the case is clear and undoubted. This was a natural spring, the waters of which had acquired a natural channel from its source to the river. It is absurd to say that a man might take the water of such a stream, four feet from the surface." Martin, B.: "A river begins at its source when it comes to the surface, and the owner of the land on which it rises cannot monopolize all the water at the source, so as to prevent its reaching the lands of other proprietors lower down."¹

It is not, however, necessary to constitute a watercourse that the water should flow continually, as a channel may be occasionally dry,² but it must appear that the water flows usually in a regular channel, and has a well defined and substantial existence,³ the law making a distinction between a regular flowing stream which at certain seasons is dried up and those occasional bursts of water which in times of freshets and melting of snows descend from the hills and inundate the country.⁴ So also the waste water from a canal, allowed to pass out of the canal, is not a watercourse to which any of the doctrines either as to natural or artificial streams will apply.⁵ "The water

A watercourse must flow in a regular channel, but may be occasionally dry.

¹ *Dudden v. Clutton Union*, 11 Ex. 627; *Rawstron v. Tayler*, 11 Ex. 369; *Wood v. Waud*, 3 Ex. 748, 779; *Angell on Watercourses*, 5, 6; see also *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710.

² See *Drewett v. Sheard*, 7 Car. & P. 465; *Trafford v. Reg.*, 8 Bing.

204.

³ *Angell on Watercourses*, 5.

⁴ *Ibid.*; see also *Drewett v. Sheard*, 7 Car. & P. 465.

⁵ *Staffordshire Canal v. Birmingham Canal*, L. R., 1 H. L. 254, 272; *Rochdale Canal v. Radcliffe*, 18 Q. B. 287. See also Ch. V.

“passing from the Wolverhampton Level to the Atherly Junction,” says Lord Cranworth, “is not a natural, nor even an artificial, stream in the sense in which these words are understood in the many cases in which the law relating to flowing water has been considered. The water in this canal is not flowing water. It is water accumulated under the authority of the legislature in what is in fact only a tank or reservoir, which the respondents are bound to economize, and use in a particular manner for the convenience of the public. It never flows. It is let down artificially, for the convenience of persons wishing to pass with boats, by what may be called steps, till it reaches the Atherly Level, and so enables the boats to pass into appellant’s canal. To such water none of the doctrines either as to natural or artificial streams is applicable.”

A water-course consists of bed, bank, and water.

Every watercourse, says Mr. Angell,¹ consists of—1. The bed; 2. The bank or shore; 3. The water. The bed is covered by the water, and is the space subjacent to the water through which it flows, and is that which contains the water at its fullest when it does not overflow its banks. It is, generally speaking, all the soil below the high water mark either of the ordinary daily tides or of the ordinary floods.² “The bed of a river is the *alveus*, as distinguished from the shore, and from places where flood waters occasionally collect.”³ The bank is the outermost part of the bed in which the river naturally flows. The shore or beach may be defined as that part of the river-bed lying between the top of the bank and that part of the bed where the river actually flows, and which, as the water rises or falls, is land or river. The bed and the water may be said to be correlative terms, as one cannot be owned without touching the other.⁴

¹ Angell on Watercourses, 30; Grotius de Jur. Belli, 2, 8, 9.

² As to this, see *Menzies v. Breadalbane*, 3 Wils. & Shaw, 243.

³ Per Lord Campbell, C. J., in

Abraham v. Great Northern Rail., 16 Q. B. 592. See *R. v. Oxfordshire*, 1 B. & A. 289; *Reg. v. Derbyshire*, 2 Q. B. 745, 755.

⁴ Angell on Watercourses, 30.

It is generally laid down in the text-books and in the earlier reported cases that the right of private property in a watercourse is derived as a corporeal right and hereditament from or is embraced in the ownership of the soil over which it naturally passes, according to the well-known maxim, *cujus est solum, ejus est usque ad cælum*.¹ "A water-course," says Woolrych,² "may be either a real or a corporeal hereditament. If by grant, prescription, or otherwise, one should have an easement of this kind in the land of another person, it would partake of the latter quality; but if the water flow over the party's own land, although indeed it cannot be claimed as *water*, yet it is in effect identified with the realty, because it passes over the soil, and *cujus est solum, ejus est usque ad cælum*." "An action cannot," says Blackstone,³ "be brought to recover the possession of water by the name of water only, but it must be brought in respect of the land which lies at the bottom, and the description of it must be,—so much land covered with water." From this identification of the land with the water a grant of a field or meadow will carry all the timber and water standing and being thereupon.⁴ This doctrine is supported by modern authority with regard to standing and percolating water, and also, it would appear, with regard to running water which rises and remains for the whole of its course on the land of a single owner, for in such cases the water is the absolute property of such owner, and no one is entitled to share the use of it with him;⁵ but with regard to natural streams flowing through adjoining lands, the enjoyment of which is only usufructuary and not absolute, the right to use the water has been held in modern cases not to arise from the

The right to the use of the water of a watercourse does not arise from the ownership of the soil thereof.

¹ Angell on Watercourses, 8; Woolrych on Waters, 146; Phear on Waters, p. 22; 1 Stephen's Black. 7th ed., pp. 659, 693; Co. Litt. 4; Rex v. Whurton, Holt, 499.

² Page 146.

³ 2 Comm. 18.

⁴ Angell on Watercourses, 9; 1 Greenleaf's ed. Cruise's Dig. 37.

⁵ See *Holker v. Porrit*, L. R., 10 Ex. 59; *Chasemore v. Richards*, 7 H. L. 349; *Acton v. Blundell*, 12 M. & W. 324; *New River Co. v. Johnson*, 2 E. & E. 435; and *post*, Ch. III.

But from the
right of access
thereto.

ownership of the soil on the stream, but from the right of access to it which landowners on its banks have by the law of nature.¹ "With respect to the ownership of the bed of the river," says Lord Selborne in *Lyon v. Fishmongers' Co.*, "this cannot be the foundation of riparian rights properly so called, because the word riparian is relative to the banks and not to the bed of the stream; and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good *jure naturæ* as vertical; and not only the word 'riparian,' but the best authorities, such as *Miner v. Gilmour*,² and the passage which one of your lordships has read from Lord Wensleydale's judgment in *Chasemore v. Richards*,³ state the doctrine in terms which point to lateral rather than vertical. It is true that the banks of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of a stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right." Lord Cairns, L. C., says, in the same case,⁴ "I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream. The late Lord Wensleydale observed in this House, in the case of *Chasemore v. Richards*,⁵ 'The subject

¹ *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662.

² 12 Moo. P. C. 131.

³ 7 H. L. 349.

⁴ Page 673.

⁵ 7 H. L. 382.

“ of right to streams of water flowing on the surface has
 “ been of late years fully discussed, and by a series of
 “ carefully considered judgments placed upon a clear and
 “ satisfactory footing. It has been now settled that the
 “ right to the enjoyment of a natural stream of water on
 “ the surface, *ex jure naturæ*, belongs to the proprietor of
 “ the adjoining lands, as a natural incident to the right to
 “ the soil itself, and that he is entitled to the benefit of it,
 “ as he is to all the other natural advantages belonging to
 “ the land of which he is the owner. He has the right to
 “ have it come to him in its natural state, in flow, quantity
 “ and quality, and to go from him without obstruction,
 “ upon the same principle as he is entitled to the support
 “ of his neighbour’s soil for his own in its natural state.
 “ His right in no way depends on prescription or the
 “ presumed grant of his neighbour.’” In the case of
Embrey v. Owen,¹ the same learned judge, then Baron
 Parke, says, “The right to have the stream to flow in its
 “ natural state without diminution or alteration is an
 “ incident to the property in the land through which it
 “ passes; but flowing water is *publici juris*, not in the
 “ sense that it is *bonum vacans*, to which the first occu-
 “ pant may acquire an exclusive right, but that it is
 “ public and common in this sense only, that all may
 “ reasonably use it who have a right of access to it, that
 “ none can have any property in the water² itself except
 “ in the particular portion which he may choose to abstract
 “ from the stream and take into his possession, and that
 “ during his possession only: see 5 B. & A. 24. But
 “ each proprietor of the adjacent land has the right to the
 “ usufruct of the stream which flows through it.”³

It would appear, therefore, that the ownership of the
 bed of a watercourse, not being the natural foundation of
 the right to the use of the water, the grantee of lands
 through which there was a watercourse, would have the

¹ 6 Ex. 369.

² Except by statute; see *Med-
 way Co. v. Earl of Romney*, 9 C. B.,
 N. S. 575. See *post*, Ch. III.

³ See also judgment of Leach,
 V. C. in *Wright v. Howard*, 1 S. &
 St. 190; and *Mason v. Hill*, 5 B. &
 A. 1.

full use of the water therein, although the bed of the watercourse were reserved to the grantor.

The natural and acquired rights to the use of water are fully treated of in subsequent chapters.¹ It is proposed in the present chapter to consider the rights of property in the bed of watercourses, apart from the use of the water. The subject will be best treated of under the following heads:—

1. Tidal Navigable Rivers ;
2. Private Rivers and Streams ;
3. Lakes and Pools ;
4. Artificial Watercourses.

Tidal Navigable Rivers.

Definition.

A public navigable river is a river which is actually navigable, and in which the tide ebbs and flows ; all other rivers on which navigation is carried on are private rivers over which the public have acquired a right or easement of navigation.²

Ownership of soil of bed.

The bed of all navigable rivers where the tide flows and reflows,³ and of all estuaries and arms of the sea is by law vested *primâ facie* in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the right of navigation which belongs by law to the subjects of the realm,⁴ or the right of fishery, which is *primâ facie* common to all.⁵

¹ See Chaps. III. and IV. *post*.

² The word navigable in a legal sense, as applied to a river in which the soil *primâ facie* belongs to the Crown and the fishing to the public, imports that the river is one in which the tide ebbs and flows; *Murphy v. Ryan*, Ir. R., 4 C. L. 143; see also *Bloomfield v. Johnson*, Ir. R., 8 C. L. 63; and per *Whiteside, C. J.*, in *Bristowe v. Cornician*, Ir. R., 10 Ch. 434.

³ The word tide is not confined to salt water, but includes the fresh water ponded back; *R. v.*

Smith, 2 Doug. 441; *Hume v. M'Kenzie*, 6 Cl. & F. 628.

⁴ *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Williams v. Wilcox*, 8 A. & E. 337; *Carter v. Murcott*, 4 Burr. 2163; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Malcolmson v. O'Dea*, 10 H. L. 593; *Lord Advocate v. Hamilton*, 1 Macqueen, H. L. 47; *Seebkristo v. East India Co.*, 10 Moo. P. C. 140; see *Hale de Jure Maris*, p. 1.

⁵ *Malcolmson v. O'Dea*, 10 H. L. 593.

Much discussion has arisen both in this country and in America, whether or not this ownership of the Crown and the public rights above stated are confined to tidal rivers, or whether they may also exist in non-tidal rivers which are in fact navigable, and have been used for the purposes of commerce from time immemorial. In America the Courts of some of the States have adopted one rule and some the other, the decision of the question appearing to depend much on the magnitude of the river in question.¹ In this country a series of modern decisions seems at last to have settled the law, and to have confined the rights of the Crown and of the public to tidal waters.

Rights of the Crown confined to tidal waters.

In the case of *Murphy v. Ryan*,² in which an action was brought for trespass to a fishery in the non-tidal part of a navigable river, and defendant pleaded that the river was a royal river, and the right of fishery was in the public, on demurrer to this plea, O'Hagan, J., delivering the judgment of the Court, held that above the flux and reflux of the tide, the soil and fishing of rivers was vested *primâ facie* in the riparian owners, and not in the Crown and the public, and this none the less because the river was navigable, and had been immemorially navigated for commercial and other purposes.

In *Hargreaves v. Diddams*,³ and *Musset v. Burch*,⁴ the Court of Queen's Bench have held, that where a river above the tide is made navigable by Act of Parliament, which does not expressly touch the rights of the riparian owners, none of the incidents attaching to a navigable river, up to the flow and reflow of the tide, can properly attach; and that, therefore, a claim by one of the public to fish there cannot exist in law.

¹ See Hough, p. 26; Angell on Watercourses, c. 13, and per Dowse, B., in *Bristowe v. Cormican*, Ir. R., 10 C. L. 68; and per Lord Hatherley in *Lyon v. Fishmongers' Co.*, 1

App. C. 662.

² Ir. R., 2 C. L. 143.

³ L. R., 10 Q. B. 527.

⁴ 35 L. T., N. S. 486; see also *Hudson v. McRae*, 4 B. & S. 585.

In *Bristowe v. Cormican*,¹ the House of Lords held that the Crown has no *de jure* right to the soil or fisheries of inland non-tidal lakes, Lord Blackburn thus stating the law:—"The property in the soil of the sea, and of estuaries "and of rivers, in which the tide ebbs and flows, is *primâ facie* of common right vested in the Crown; but the "property of dry land is not of common right in the Crown. "It is clearly and uniformly laid down in our books, that "where the soil is covered with the water forming a river "in which the tide does not flow, the soil does of common "right belong to the owners of the adjoining land, and "there is no case or book of authority to show that the "Crown is of common right entitled to land covered by "water, where the water is not running water forming "a river, but still water forming a lake."² Again, in *Orr Ewing v. Colquhoun*, where it is laid down by the House of Lords that the public, who have acquired by user the right to navigate on an inland non-tidal water, have no right of property in the bed—Lord Blackburn observes, that the right of the Crown as regards the soil of the *alveus*, and of the public to navigate, are not the same in such a river as they are in the sea or in a tidal estuary.³ It may now therefore be said to be clear law, that up to the point where the tide ebbs and flows in a navigable river, the soil is *primâ facie* in the Crown; and, above that point, whether in rivers navigable or not, the soil is presumed to belong to the riparian owners to the middle line of the stream.⁴

What is evidence that a river is navigable.

Though the flux and reflux of the tide is *primâ facie* evidence that a river is navigable, it does not necessarily follow, that because the tide flows and reflows in any particular place, it is therefore a public navigation,

¹ 3 App. C. 641.

² 3 App. C. 666.

³ 2 App. C. 839; see also per Lord Selborne in *Lyon v. Fishmon-*

gers' Co., 1 App. C. 682; and *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68.

⁴ See *Bickett v. Morris*, L. R., 1 Sc. App. 47.

although of sufficient size. The strength of the evidence arising from the flux and the reflux of the tide, must depend on the situation and nature of the channel. If it is a broad and deep channel, calculated to serve for the purpose of commerce, it will be natural to conclude that it has been a public navigation; but if it is a petty stream navigable only at certain states of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it has ever been a public navigable channel.¹ It is more reasonable to hold that navigable is a relative and comprehensive term containing within it all such rights upon the water way as with relation to the circumstances of each river are necessary for the full and convenient passage of vessels and boats along the channel.² The actual user of a tidal river, for the purposes of navigation, is of course the strongest evidence of its navigability.³ From this it follows that, whenever a river ceases to be navigable either by natural causes, such as the silting up of the channel, or by virtue of Act of Parliament, or by order of Commissioners of Sewers, or by the writ *ad quod damnum*, and an inquisition found thereon by a jury, the public right of navigation will cease, at any rate till the obstruction be removed; ⁴ the public right will not however be barred by an artificial obstruction which has existed for more than twenty years.⁵ Where a river was formerly navigable, but became silted up, and by Act of Parliament power was given to commissioners to restore the navigation, and they were authorized to make and made a new cut, the navigation of which was to be open to the public on payment of tolls;

¹ *Rex v. Montague*, 4 B. & C. 598; see also *Mayor of Lynn v. Turner*, 1 Cowp. 36; *Rose v. Miles*, 5 Taunt. 705. For definition of a navigable river according to the French law existing in Canada, see *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.); according to American law, see Angell on Watercourses, ch. 13; and as to the distinction between "navigable"

and "boatable."

² *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

³ *Miles v. Rose*, 5 Taunt. 705; see per Bayley, J., in *Foight v. Winch*, 2 B. & Ald. 662.

⁴ *R. v. Montague*, 4 B. & C. 598. See also *R. v. Douglas*, 2 Lord Keny. 499, and Woolrych on Waters, p. 237.

⁵ *Foight v. Winch*, 3 B. & Ald. 662.

it was held that the new cut was a public navigable river, the obstruction of which was an indictable nuisance; and that the public had the same rights over it as over the original stream.¹

Limits of the property of the Crown.

The right of the Crown to the *alveus* of navigable rivers is limited to the line of ordinary high water mark, as is the case on the sea shore, and the adjoining land beyond this line is presumed to belong to the adjoining owners.² This line is clearly liable from natural causes to a shifting of position from time to time: if the alteration take place by imperceptible degrees, the boundary, as between the Crown or its grantees and the adjoining owners, will follow the line, whether it gain upon the land or not; but if the new position be taken suddenly, whether in advance or recession, the old line continues to be the boundary between the territory of the Crown and that of the shore proprietors.³

Where a river changes its course.

Following this principle, it would appear that where a tidal river gradually and imperceptibly changes its course, the Crown will remain the owner of the bed; but where the change is sudden and perceptible, or where by the irruption of the waters of a tidal river an entirely new channel is formed in the land of a subject, the right to the soil of the new channel remains as before in the subject.

This point was raised in the case of *The Mayor of Carlisle v. Graham*,⁴ which was an action for trespass to plaintiffs' several fishery in the navigable tidal river Eden. It appeared that about the year 1693 the river began to leave its former bed where plaintiffs' fishery was situate, and to flow down a channel which was formerly a ditch on the land of the Earl of Lonsdale, under whom defendants claimed. The plaintiffs claimed to have the several fishery in the new channel, but the Court held, following *Murphy v. Ryan*,⁵ that the right of the Crown to

¹ *Reg. v. Betts*, 16 Q. B. 1022.

⁴ L. R., 4 Ex. 361.

² See *ante*, p. 12, 13.

⁵ Ir. R., 2 C. L. 68.

³ *Phear*, p. 43.

grant a several fishery in a tidal river depends on its proprietorship of the bed, and that the bed in this case remained, as before, the property of the former owner. Kelly, C.B., delivering the judgment of the Court, says: "All the authorities ancient and modern are uniform to the effect that, if by the irruption of the waters of a tidal river, an entirely new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river, the right to the soil remains in the owner, so that if at any time thereafter the waters should recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public."¹

In the case of *Ford v. Lacy*² a question arose as to the ownership of some land on the River Lea; and though it appears that the river in the *locus in quo* was not navigable, the principles involved in the decision of the case would seem nevertheless to apply to land on navigable rivers as well. It was proved that formerly the river was the boundary of the two counties Middlesex and Essex; but that the bed was wholly in Essex. The piece of land in question was a narrow strip on the Middlesex side of the river, extending from the river to some posts, and had formerly been part of the bed of the river. The plaintiff, the owner of a farm on the Essex side, had exercised rights of ownership over the land claimed since 1814. Vicarial tithes had been taken for the parish of Waltham, in Essex, and it had been rated to the said parish. The defendant occupied land adjoining the land claimed, and proved an award under the Inclosure Act, 1804, by which all the land up to the river was allotted to his landlord. The learned judge at the trial asked the

¹ See also *Hale de Jure Maris*, pp. 5, 6, 11, 13, 16, 37, and *Reg. v.*

Betts, 16 Q. B. 1022.

² 7 H. & N. 151.

jury,—1st. Whether the pieces of land in question were in Essex; 2nd. Whether they were in the parish of Waltham; 3rd. Whether they were in possession of plaintiff; 4th. Whether they were the property of defendant's landlord. The jury found for the plaintiff. On motion for a new trial,—on the ground that the learned judge should have directed the jury that land left by a river becomes part of the adjoining property and county,—the rule was refused; the Court approving of the doctrine laid down by Lord Hale,¹ that if the change was sudden and perceptible, and if the former marks remained, and the extent could reasonably be ascertained, the soil remains in the former owner; and Pollock, C.B., remarking in the course of the argument that, if for fifty years the land had been treated as part of Essex, it must be presumed that the water had receded suddenly.

In the late case of *Foster v. Wright*² the question as to the ownership of the bed of a river which had gradually and imperceptibly changed its course was raised and fully discussed. The plaintiff was lord of a manor under grants from the Crown, giving him the right of fishing in all the waters of the manor. Some manor land near, but not adjoining a river in the manor, was enfranchised and became the property of the defendant. Subsequent to this enfranchisement the manor was forfeited to the Crown, but was regranted with free liberty of fishing in all its waters. The river, which then ran wholly within lands of the plaintiff, afterwards wore away its bank, and by gradual progress, not visible but periodically ascertained, during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river. The extent of the encroachment could be defined and identified. An action of trespass was brought by the plaintiff against the defendant for fishing on this strip of land covered with water. The Court held that

¹ See p. 63, note 1.

² 4 C. P. D. 438.

the action would lie on the ground that at the time of the grant, and of the regrant of the manor, the whole of the bed of the river, and of the exclusive right of fishing therein was the property of the plaintiff; and that this property in the bed was not lost by the gradual and imperceptible change of the bed, although the former boundaries could be ascertained. Lindley, J., delivering the judgment of the Court, says: "Since the regrant of the manor, the course of the river between the points above referred to has gradually changed; its bed has gradually approached nearer and nearer to the defendant's land; and now some portion of that land has become part of the river bed. This part can still be identified, and its boundary can be ascertained. The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property. I am of opinion that it does. The change of the bed of the river has been gradual; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. Under these circumstances, I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner. Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex v. Yarborough*;¹ and, conversely, land gradually incroached upon by water ceases to belong to the former owner: *In re Hull and Selby Rail. Co.*² The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shows this to be the case. Our

¹ 3 B. & C. 91; 5 Bing. 163.² 5 M. & W. 327.

“ own law may be traced back through *Blackstone*,¹ *Hale*,²
 “ *Britton*,³ *Fleta*,⁴ and *Braeton*,⁵ to the *Institutes of Jus-*
 “ *tinian*,⁶ from which *Braeton* evidently took his exposition
 “ of the subject. Indeed, the general doctrine, and its
 “ application to non-tidal and non-navigable rivers in cases
 “ where the old boundaries are not known, was scarcely
 “ contested by the counsel for the defendant, and is well
 “ settled: see the authorities above cited: but it was con-
 “ tended that the doctrine does not apply to such rivers
 “ where the boundaries are not lost; and passages in
 “ *Britton*,⁷ in the *Year Books*,⁸ and in *Hale de Jure*
 “ *Maris*,⁹ were referred to in support of this view. *Ford*
 “ *v. Lacy*¹⁰ was also relied upon in support of this distinc-
 “ tion. *Britton* lays down as a general rule that gradual
 “ incroachments of a river enure to the benefit of the
 “ owner of the river; but he qualifies this doctrine by
 “ adding, ‘if certain boundaries are not found.’ The
 “ same qualification is found in 22 Ass. pl. 93, which
 “ case is referred to in *Hale, ubi supra*. But, curiously
 “ enough, this qualification is omitted by *Callis* in his
 “ statement of the same case: see *Callis*, p. 51; and, on its
 “ being brought to the attention of the Court in *Re Hull*
 “ *and Selby Rail. Co.*,¹¹ the Court declined to recognize it,
 “ and treated it as inconsistent with the principle on which
 “ the law of accretion rests. Lord Tenterden’s observa-
 “ tions in *Rex v. Yarborough*¹² are also in accordance with
 “ this view; and, although Lord Chelmsford in *Attorney-*
 “ *General v. Chambers*¹³ doubted whether, where the old
 “ boundaries could be ascertained, the doctrine of accretion
 “ could be applied, he did not overrule the decision of *In*
 “ *re Hull and Selby Rail. Co.*,¹⁴ which decided the point so
 “ far as incroachments by the sea are concerned.

¹ Vol. ii. c. 16, pp. 261, 262.

² Do Jure Maris, cc. 1, 6.

³ Book ii. c. 2.

⁴ Book iii. c. 2, ss. 6, &c.

⁵ Book ii. c. 2.

⁶ Inst. ii. 1, 20.

⁷ *Ubi supra*.

⁸ 22 Ass. p. 106, pl. 93.

⁹ Book i. c. 1, citing 22 Ass. pl. 93.

¹⁰ 7 H. & N. 151.

¹¹ 5 M. & W. 327.

¹² 3 B. & C. 106.

¹³ 4 De G. & J. 69—71

¹⁴ 5 M. & W. 327.

“Upon such a question as this, I am wholly unable to see any difference between tidal and non-tidal or navigable or non-navigable rivers; and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: *De Jure Maris*, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford v. Lacy*,¹ the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion, and I do not regard that case as throwing any real light on the question I am considering.”

A public navigable river, *intra fauces terræ*, where a man may reasonably discern between shore and shore, it has been said by Lord Hale, is or may be within the body of a county;² and will thus be subject to the jurisdiction of the justices of the county, and of the Common Law, except in the cases of murder, and mayhem done in great ships, where formerly the admiral,³ and now the Central Criminal Court, has a concurrent jurisdiction with the Courts of Common Law.⁴ The shore between high and low water mark on rivers and estuaries is within the exclusive jurisdiction of the justices of the adjoining county, whether the offence be committed when the shore is or is not covered with water.⁵

The bed and shore of a public navigable river does not, in the absence of evidence, form part of the adjoining parish, but is *prima facie* extra-parochial.⁶ Evidence may be given to show that it is within the parish.⁷ Now,

¹ 7 H. & N. 151.

² *De Jure Maris*, Harg. Tracts, p. 10; Ow. 122; see also Cockburn, C. J., in *Reg. v. Keyn*, 2 Ex. D. 164.

³ Stat. Ric. II. c. 3.

⁴ 4 & 5 Will. IV. c. 36; *Reg. v. Keyn*, *supra*.

⁵ *Embleton v. Brown*, 3 E. & E. 224; *Reg. v. Musson*, 8 E. & B. 900.

⁶ *Reg. v. Musson*, *supra*; *Duke of Bridgewater v. Bootle-cum-Linacre*, L. R., 2 Q. B. 4.

⁷ *Reg. v. Musson*, *supra*; *Cory v. Bristow*, 2 App. C. H. L. 262;

Bed of a public navigable river is presumably within the county.

Not presumably within the parish.

however, by 31 & 32 *Vict. c. 122*, s. 27, every accretion of the sea, whether natural or artificial, and the part of the sea shore to the low water mark, and the bank of every river to the middle of the stream, which at the date of the Act were not incorporated with any parish, are, for all civil parochial purposes, annexed to and incorporated with the next adjoining parish with which it has the longest common boundary. The shore between high and low water mark of a tidal river is also an extra-parochial place within the *Nuisances Removal Act*, 1855, 18 & 19 *Vict. c. 121*.¹

It may, therefore, be presumed that where a tidal river forms the boundary of two counties, the boundary line of the two counties will pass through the centre of the stream, though this presumption may be rebutted; but that where it forms the boundary between two parishes, the presumption is that the bed up to high water mark is extra-parochial, except for certain statutory purposes.²

McCannon v. Sinclair, 2 E. & E. 53; *R. v. Landulph*, 1 Moo. & Rob. 393.

¹ *Reg. v. Gee*, 1 Ell. & Ell. 1068.

² The subject of the rights of different nations whose territories are washed by the same river, is one connected with international law, and does not, therefore, properly fall within the scope of this work. It may, however, be of interest to the reader to note some points with regard to it.

The territory of a State includes the lakes, seas, and rivers entirely inclosed within its limits. . . . Where a navigable river forms the boundary of contiguous States, the middle of the channel or *thalweg* is generally taken as the line of separation between the two States, the presumption of law being, that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long-undisturbed possession giving to one of the riparian proprietors the exclusive title to the entire river.

(Wheaton, *Elements of International Law*, p. 346; Wheaton, *Law of Nations*, pp. 577—583.)

Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor; this is what is called an innocent use. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits and other arms of the sea leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating for commercial purposes a river which flows through the territories of different States, is common to all nations inhabit-

International
rights on
rivers form-
ing boundary
between two
States.

The property of the Crown in the soil of navigable rivers may be communicated to a subject in the same way Property of Crown in the

ing the different parts of its banks; but this right of innocent passage, being what text writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise. (Grotius de Jur. Bel. ae Pac. lib. ii. cap. 2, §§ 12, 14; Vattel, Droit des Gens, liv. ii. ch. 9, ss. 126—130; ch. 10, ss. 132—134; Puffendorf de Jur. Naturæ et Gentium, lib. iii. cap. 3, ss. 3—6; Wheaton, Elements of International Law, pp. 346, 347.)

It seems this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself—*c.g.*, according to Roman law, right to use of shore to moor, to lade and unlade, incident to right to navigate; and public jurists apply this principle to the same case, between nations.

These rights are imperfect, and can be modified by compact. Cf. the case of the navigation of the Scheldt, and of the rivers whose navigation was regulated by the Treaty of Vienna, 1815, Neckar, Mayne, &c. (Wheaton's Elements of International Law, pp. 347, 348.)

By Treaty of Vienna, 1815, the commercial navigation of rivers which separate different States, or flow through their respective territories, was declared to be entirely free in their whole course from the point where each river becomes navigable to its mouth; provided that the regulations relating to the police of the navigation should be observed, which regulations were to be uniform, and as favourable as possible to the commerce of all nations. (Wheaton's Elements of International Law, p. 348, n., *et seq.*) Cf. also the case of the navigation of the Rhine, p. 350, the case of the navigation of the Mississippi, p. 352 *et seq.*, the case of the navi-

gation of the St. Lawrence, p. 356 *et seq.*, the case of the navigation of the Plata and Parana rivers, p. 360, n. 1; and see the discussion as to the freedom of navigation of the Amazon, which took place between the United States and Brazil, and the arguments thereon. (Ib.)

TREATY OF VIENNA, 1815, June 9th (extracted from Hertslott's Collection of Treaties, vol. i. pp. 3, 5, 15, 16.)

General Treaty signed in Congress at Vienna, 9th June, 1815, and since acceded to by all the other powers of Europe.

Art. 108.—The powers whose States are separated or crossed by the same navigable river, engaged to regulate, by common consent, all that regards its navigation. For this purpose they will name commissioners, who shall assemble, at latest, within six months after the termination of the congress, and who shall adopt, as the basis of their proceedings, the principles established by the following articles.

Art. 109.—The navigation of the rivers along their whole course, referred to in the preceding article, from the point where each of them becomes navigable to its mouth, shall be entirely free, and shall not, in respect to commerce, be prohibited to any one; it being understood that the regulations established with regard to the police of this navigation shall be respected; as they will be framed alike for all, and as favourable as possible to the commerce of all nations.

These articles provided, besides, for the liberty of navigation, a uniform system for the collection of duties, and for the maintenance of police, as well as for regulations as to tariff, the establishment of offices for the collection of duties, custom houses, and the repair, &c. of towing paths. Harbour duties

bed may be granted to a subject.

as may the property in the sea shore, and may be claimed by a subject either in gross or as parcel of an adjoining

were prohibited, and such as existed were to be preserved for such time only as was necessary for navigation. Everything in the articles was to be settled by a general arrangement, which being once settled was not to be changed.

With regard to towing paths, each State bordering on the rivers shall be at the expense of keeping in good repair those passing through its territory, and of maintaining the necessary works through the same extent in the bed of the river, in order that no obstacle may be experienced in the navigation.

The intended regulation was to determine the manner in which States bordering on rivers were to participate in these latter works, where opposite banks belonged to different Governments.

The principles laid down in this treaty were those suggested in a memoir by Baron Von Humboldt, plenipotentiary of Prussia, and presented on the 3rd February, 1815. *Inter alia*, he states that, "In order to conciliate the interests of commerce with those of the riparian State, it would be necessary, on the one hand, that every regulation indispensable to the freedom of navigation from the point where a river becomes navigable, to its mouth, should be adopted by common consent, in a convention subject to be altered only by the unanimous consent of the parties; and on the other hand, that no riparian State should be disturbed in the exercise of its rights of sovereignty in respect to commerce and navigation beyond the stipulations of this convention, and at the same time should be entitled to its share of the net revenues collected upon the navigation in proportion to the extent of its territory along the banks of the river. It would be necessary to establish upon these bases principles so general that the diffe-

rence in localities should only require modifications in their detailed application. (Wheaton, History of the Law of Nations, p. 499.)

These principles have been applied by detailed convention to regulate the navigation of the Rhine, Scheldt, Meuse, Moselle, Elbe, Oder, Weser, and the Po, and their confluent rivers. (Ib. p. 501.)

The principles established by the Congress of Vienna, and applied to the navigation of the great European rivers, had been long before asserted by the Government of the United States, in respect to the navigation of the Mississippi, at the time when both banks of that river for a considerable distance above its mouth were in possession of Spain. Since 1783, the right of navigating the Mississippi is now vested exclusively in the United States and their citizens. (Ib. 506 *et seq.*)

"The right of the United States to participate with Spain in the navigation of the River Mississippi previously to the cession of Louisiana, was rested by the American government on the sentiment written in deep characters on the heart of man, that the ocean is free to all men, and its rivers to all riparian inhabitants. This natural right was found to be acknowledged and protected in all tracts of country united under the same political society, by laying the navigable rivers open to all the inhabitants of their banks. When these rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream be in any case obstructed, it is an act of force by a stronger society against a weaker condemned by the judgment of mankind." (Ib. p. 508.)

Cf. the account of discussion between American and British governments as to the navigation of the St. Lawrence. (Ib. 511 *et seq.*)

manor. The grantees of the Crown, of course, take subject to all the public rights, and any grant of the Crown so as to be detrimental to the public right is void as to such parts as are open to such objections, if acted upon so as to effect nuisance by working injury to the public right.¹ Such grants of the soil can now only be made by Act of Parliament.

It has been shown² that the shore of the sea between high and low water mark may form parcel of the adjoining manor, and may so pass by grant from the Crown to a subject. There would appear to be no distinction as to this between the shore of the sea and of tidal rivers.³ But as the soil of the bed of tidal rivers *below low water mark* is vested *primâ facie* in the Crown, independently of any ownership in the adjoining land, and as this ownership of the soil below low water mark may be granted to a subject, questions might arise as to the boundaries of such grants when the Crown is also owner of the adjoining land. A grant of lands on non-tidal waters, in the absence of evidence to the contrary, conveys the soil of the bed *usque ad medium filum aquæ*;⁴ and this, independently of the breadth of the stream.⁵ A grant of land by the Crown, bounded by a non-navigable creek of *Botany Bay*, has been held to pass the soil of the creek *ad medium filum aquæ*, as the description of the boundaries in the grant did not exclude from it that portion of the creek which, by the general presumption of the law, would go along with the ownership of the land on the banks of it; and as the same rules of common sense and justice must apply in the construction of a deed, whether the subject-matter of construction be a grant from the Crown or from a subject,

Limits of grants by the Crown on public navigable rivers.

¹ *A.-G. v. Parmeter*, 10 Price, 378, 412, H. L.; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; see *ante*, p. 14. As to implied grants, &c., see *ante*, p. 16 *et seq.*

² *Ante*, p. 13.

³ See *Duke of Bridgewater v. Bootle-cum-Linacre*, L. R., 2 Q. B. 4;

Blundell v. Catteral, 5 B. & Ald. 268.

⁴ See *Orr Ewing v. Colquhoun*, 2 App. 839; *Bickett v. Morris*, L. R., 1 H. L. Sc. 47; *Wishart v. Wyllie*, 1 M. & Q., H. L. 839.

⁵ *Dwyer v. Rich*, Ir. R., 4 C. L. 414.

and it being always a question of intention to be collected from the language used with reference to the surrounding circumstances.¹ Following this principle, it would appear that as there is no presumption of law that the ownership of the bed of a tidal navigable river goes along with the ownership of the shore, a grant of lands by the Crown on the banks would *prima facie* be bounded by the line of high water mark; but that, by evidence to that effect, it might be shown to include both the shore between high and low water mark and the bed below low water mark.

A navigable river is a public highway.

A navigable river is a public highway navigable by all her Majesty's subjects in a reasonable way and for a reasonable purpose.² The public right of free passage extends to the whole of the navigable channel,³ which it appears may be used as a highway by the public whenever it suits their convenience, whether such navigation be valuable or not.⁴ It includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels,⁵—such as the right of stopping for a reasonable time to unload,⁶ and of grounding and anchoring free of toll.⁷ The right of navigation is paramount to the right of property of the Crown and its grantees in the bed of the river, and such property cannot be used in any way so as to derogate or interfere with the public right of navigation;⁸ and any grant by the Crown which interferes with the public right is void as to such parts as are open to such objections, if acted upon so as to effect nuisance by working injury to the public right.⁹ The public right can only be abridged by Act of Parliament, by

¹ *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473.

² *Original Hartlepool Colliers v. Gibb*, 1 Ch. D. 713.

³ *A.-G. v. Terry*, L. R., 9 Ch. 423; *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Williams v. Wilcox*, 8 A. & E. 314.

⁴ *A.-G. v. Lonsdale*, L. R., 7 Eq. 377.

⁵ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁶ *Original Hartlepool Colliers v. Gibb*, 1 Ch. D. 713.

⁷ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

⁸ *Ib.*; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

⁹ *A.-G. v. Parmeter*, 10 Price, 412.

writ *ad quod damnum*, followed by an inquisition, or by natural causes,—such as the recess of the sea, or the accumulation of soil or mud;¹ in which case the river ceases to be navigable, at least until such causes are by some means counteracted.² Where a navigable river changes its bed, though the soil of the bed and the right of fishing may be vested in the owner of the adjoining land, it would appear that the right of navigation will follow to the new channel,—the test being whether the river remains tidal.³ An artificial obstruction to a navigable river, though of more than twenty years' duration, will not operate as a bar to the public right.⁴

Obstructions to navigation.

Any erection on the bed of a navigable river obstructing the navigation, even if erected by the authority of the Crown, is illegal, and is a public nuisance,⁵ and the subject of an indictment⁶ and information,⁷ and of an action on proof of special damage.⁸ Any unauthorized erection on the bed of a navigable river by any person other than the owner of the soil is a *purpresture*, and is, *per se*, illegal, even though it cause no actual obstruction to the navigation; though there may be cases of so trifling a nature, that the Courts will not interfere by injunction to restrain or abate them.⁹ The question whether the owner of the soil of the bed of a navigable river may erect on the bed of the river works which cause no obstruction to the navigation, and no injury to the rights of the riparian owners, or whether such erections are illegal *per se*, is a question which has given rise to some apparently conflicting decisions; but it would now seem settled that such erections are not illegal in themselves, if they cause no

Rights of the Crown and its grantees in the bed.

¹ *Reg. v. Montague*, 4 B. & C. 598.

² *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

³ *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 366; Hale de Jure Mar. pt. 1, c. 6, p. 34; Rolle, Abr. 390; Roscoe, Crim. Ev. p. 535.

⁴ *Vooght v. Winch*, 3 B. & Ald. 662. As to navigation, see further *post*, Ch. VII.

⁵ *A.-G. v. Parmeter*, 10 Price, 412; *A.-G. v. Burridge*, 10 Price, 350; *A.-G. v. Johnson*, 1 Wils. Ch. C. 87.

⁶ *R. v. Grosvenor*, 2 Stark. 511.

⁷ *A.-G. v. Richards*, 6 Anstr. 603.

⁸ *Rosc v. Miles*, 4 M. & S. 101.

⁹ *A.-G. v. Terry*, L. R., 9 Ch. 423; *R. v. Tindall*, A. & E. 143.

actual or probable injury either to the public rights or to the adjoining riparian proprietors. The cases of *Bickett v. Morris*, and *Orr Ewing v. Colquhoun*, cited below, do not relate to tidal rivers; but as they define the rights of the owners of the beds of rivers generally, and state broadly the laws with regard to such rights, it is submitted that the principles established by them will apply, *mutatis mutandis*, to the Crown and its grantees, as owners of the bed of tidal navigable rivers.

*Menzies v.
Breadalbane.*

In the case of *Menzies v. Breadalbane*,¹ an embankment on the flood-channel of a river, which might have the effect of diverting the stream in times of flood, and throwing it upon the land of an opposite proprietor, has been held illegal, though it was intended to protect the lands of the owner who made it from the flood.² But where a riparian proprietor erected a mound, not for the purpose of altering the old course of a river, but to prevent the old course from being altered, and so encroaching on his lands, there being also evidence to show that at least part of the mound was erected on old foundations, and that it was the custom of the country for proprietors so to embank, the House of Lords held that the erection was legal.³

Where, however, an opposite proprietor complained of an erection in the *alveus* of the river, and was unable to prove that any damage had actually happened to him by the erection, it was held that, nevertheless, as the encroachment was not of a slight and trivial, but of a substantial, description, it must always involve some risk of injury. "Mere apprehension of danger," says Lord Chelmsford, "will not, however, be sufficient, but any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor; and therefore, the act being *prima facie* an encroachment, the onus seems properly to be

¹ 3 Wils. & Shaw, 235.

bane, supra.

² *Farquharson's case*, June 25, 1741; cited in *Menzies v. Breadal-*

³ *Menzies v. Breadalbane, supra.*

“cast upon the party doing it, to show that it is not an injurious obstruction.”

In *Bickett v. Morris*,¹ an application was made by a riparian owner on the banks of a non-navigable stream to the Court of Session in Scotland for an interdict, and an action was brought to have it declared that the opposite riparian owner had no right to erect buildings in the *alveus* of the river to his injury. It was contended by the defender that unless the erection complained of did some material damage to the pursuers, the Court could not interfere by action or interdict; on appeal the House of Lords held, affirming the decision of the Court of Session, that though each proprietor on the banks of a non-tidal river had a property in the soil of the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water nor to abridge the width of the stream, or to interfere with its regular course, but that anything done *in alveo*, which produces no sensible effect on the stream, is allowable; and further, that even though immediate damage cannot be described, nor actual loss predicated, yet, if an obstruction be made to the current of a stream, that obstruction is one which constitutes an injury which the Courts will take notice of as an incroachment which the adjacent proprietors have a right to have removed. In *A.-G. v. Lonsdale*,² Malins, V.-C., held that a riparian owner, who was also owner of the soil of a public navigable river, had no greater rights to use the *alveus* of a tidal river than of a non-tidal river, and that, therefore, he was not authorized to erect a jetty reaching across one-third of the width of the river; for, although the damage proved by the plaintiff, an opposite riparian owner, was not sufficient to call for the interference of the Court, yet the erection of the jetty, which was a solid pier extending fifty-three yards across the

*Bickett v.
Morris.*

*A.-G. v.
Lonsdale.*

¹ L. R., 1 H. L. Sc. 47.

² L. R., 7 Eq. 377.

river, was such an injury to the plaintiff's rights as would justify the Court to interfere without proof of such damage; and that further the defendant, as owner of the bed of the river, had no right to erect the works in question, as they might interfere with the navigation of the river, if not at present, yet at some future time.¹

*Orr Ewing v.
Colquhoun.*

In the case of *Orr Ewing v. Colquhoun*,² the appellants, the owners of the bed of a non-tidal river over which the public had by prescription a right of free navigation, erected a bridge on piers resting on the bed of the river. The House of Lords on appeal reversed an order of the Inner House, which had affirmed an interlocutor of the Lord Ordinary, and held that the piers of the bridge complained of were no actual obstruction to the navigation of the river as prescriptively enjoyed by the public; and that, therefore, the interlocutor ordaining that the piers should be removed should be reversed. Lord Blackburn, in commenting on the case of *Bickett v. Morris*,³ and the Scotch cases therein affirmed,⁴ thus explains the law:—
 “I think and submit to your Lordships, that the principle on which they were really decided was, that where
 “any unauthorized erection is a sensible injury to the
 “proprietary rights of an individual, there is *injuria* for
 “which he might, in a Court of law in England, recover
 “at least nominal damages. A Court of Equity in
 “England, or the Court of Session in Scotland, in the
 “exercise of its equitable jurisdiction, would not order
 “the removal of the erection, if convinced that the damage
 “was only nominal; but where there is an injury to the
 “proprietary rights in running streams, the present injury
 “now producing no damage may hereafter produce much.

¹ See also Jessel, M. R., in *A.-G. v. Terry*, L. R., 9 Ch. 425.

² 2 App. Cas. 839.

³ L. R., 1 H. L. Sc. 47.

⁴ *Menzies v. Breadalbane*, 3 Wils. & Sh. 238; *Aberdeen v. Menzies*,

Morr. Dict. 12, 787; *Blantyre v. Deon*, 10 Dunlop, 542; *Hamilton v. Eddington*, Morr. Dict. 12, 826; *Burnis v. Brown*, Hume's Dict. 504; *Gellatly*, 1 Macphers. 592; *Farquharson*, Morr. Dict. 12, 787.

“ And I understand the principle of *Bickett v. Morris*¹ to
 “ be, that where an erection is a present sensible *injuria* to
 “ the proprietary right of the owner of the other part of
 “ the *alveus*, or of the opposite bank of a running stream,
 “ he may have it removed on the ground that there is a
 “ present injury to the right of the property, if it is impos-
 “ sible to predicate that it may not produce serious damage
 “ in future, though the complaining party is not yet in a
 “ position to qualify present damage. And I think the
 “ same principle will apply where the complaining party
 “ is not a proprietor *ex adverso* of the spot where the
 “ erection is made, but is a proprietor of land on the
 “ banks of the stream below the spot, but so near to it that
 “ the erection *in alveo* alters the natural flow of the water
 “ on the complaining parties’ land; but I do not think it
 “ was intended to be decided, and I do not think it is the
 “ law, that an erection *in alveo* of a natural stream is illegal
 “ *per se*, if all who have property on the banks of the
 “ stream consent to the erection; nor do I think it was
 “ meant to be decided, nor do I think it law, that a
 “ riparian proprietor on the water of Kilmarnock, or on
 “ the water of Irvine, into which it flows, ten miles below
 “ the town, on whose land the flow of water would be in
 “ no way affected, could have maintained the action against
 “ Bickett for altering the line of his building in the town
 “ on the water side, which Morris, the proprietor of the
 “ houses and building ground immediately opposite, did
 “ maintain; for I think there would be no injury to the
 “ proprietary right of the party complaining in respect
 “ of such land, no *injuria* to him.” At page 861, the
 learned Lord continues, “ In the case of *A.-G. v. Lonsdale*
 “ the obstruction was in a tidal river, but it occupied one-
 “ third of the bed of the river. In *A.-G. v. Terry* there
 “ was an actual occupation by the piles put in by the
 “ defendant of part of what was used for the navigation
 “ and wanted for navigation; the Master of the Rolls

¹ L. R., 1 H. L. Sc. 47.

“submitted an opinion that the Court of Equity might order the piles to be removed, though doing no present damage to the navigation, if there might be a damage hereafter—I apprehend, on the ground of the piles being placed on the soil of the Crown, and, therefore, a wrong to the Crown. How that may be in such a case, it is unnecessary to consider. I think it clear law in England, that except at the instance of a person (including the Crown), whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on speculation that some change might occur that would render that piece of land, though not now part of the waterway, at some future period available as part of it. I think that the land being covered with water is, in such a case, a mere accident; and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island, which might at some future period be swept away.”

From these cases it would seem, that the owner of the bed of a public navigable river may exercise all the rights of property in the soil of its bed, though covered with water, provided that he does not in any way interfere with the rights of the public or of the riparian owners. It must, however, be kept in mind, that as in a public river the right of navigation extends to the whole of the navigable channel, any erection in it which might become from time to time an actual obstruction would become a nuisance and illegal.¹

Ownership of river banks and right of landing and towing thereon.

The right of navigation is a simple right of way, similar to the right which the public have to passage along a public road, and involves no right of property in the bed or banks.² The banks of a tidal river above high water

¹ See *post*, Ch. VII.; see also Jessel, M. R., *A.-G. v. Terry*, L. R., 9 Ch. 425.

² See *Orr Ewing v. Colquhoun*, 2 App. C. 839, and see *post*, p. 90.

mark remain private property, and are not "*publici juris*," so as to give the public navigating the river a right, in the absence of prescription, to land themselves or their goods, or to moor their vessels thereon.¹ It would seem, however, that the right of passing over the foreshore of a tidal river at low water mark, being a necessary incident to the right of navigation, is involved in it; and that where a person having a right to land on the banks has come to shore, he may disembark in a usual or reasonable way, as by wading or by means of a plank placed on the bed of the river.²

The banks of navigable rivers, not being *publici juris*, but remaining private property, the public are not entitled at common law to tow on the banks.³ The right of passage over the banks of a navigable river for the purpose of towing vessels is an easement or right of way only, similar in all respects to ordinary rights of way. A towing path may be a highway to be used only for towing barges or vessels.⁴ The right of towing, therefore, depends on usage or custom. Right of towing.

"That there is such a custom," says Lord Kenyon, C. J., "on most navigable rivers no person doubts, but still the right is founded solely on the custom." . . "If navigation has been carried on for a series of years, and this right of towage constantly exercised, there would be abundant usage on which it might be supported."⁵ . . "Perhaps small evidence of usage before a jury would establish a right by custom, on the ground of public convenience."⁶ Thus, with regard to the river Thames, it appears, that previous to the early statutes for the improvement of the

¹ *Ball v. Herbert*, 3 T. R. 262; *Blundell v. Catteral*, 5 B. & A. 268, per Bayley, J. See Hale de Portibus Mar. p. 84; Bracton, lib. 1, c. 12, s. 6; Callis on Sewers, p. 73.

² *Marshall v. Ulleswater Co.*, L. R., 7 Q. B. 172; *Blundell v. Catteral*, 5 B. & A. 268, per Best, J. See also *Gann v. Free Fishers of Whitstable*, 11 H. L. 192, and *ante*, p. 33.

³ *Ball v. Herbert*, 3 T. R. 253; *Peirce v. Lord Fauconberg*, Balst.

292; *Vernon v. Prior*, cited in *Ball v. Herbert*, *supra*; *Prior of Tyne-mouth's case*, Harg. Tr. 79; see *Zangers v. Whiskeard*, 38 Eliz. C. B. MSS., cited in *Ball v. Herbert*, p. 261.

⁴ See *Winch v. Conservators of Thames*, L. R., 7 C. P. 471; *Rex v. Severn and Wye*, 2 B. & A. 648.

⁵ *Ball v. Herbert*, *supra*, p. 261.

⁶ See also per Bovill, C. J., in *Winch v. Conservators of Thames*, L. R., 7 C. P. 471.

river, there were originally towing paths along the river banks, the owners of which took tolls from the public for the use of them.¹

Conservancy
of navigable
rivers.

The regulation and protection of the rights of navigation in all the principal rivers of the kingdom is now vested in Boards of Conservators, who are made the guardians, as it were, of the navigation, and the protectors of the bed and soil for the purposes of navigation.²

It may be here noted, that in the river Thames, which by its size and position is the most important of our rivers, the ownership of the soil of the bed up to high water mark, which had long been a subject of contention between the Crown and the Corporation of the City of London, is by the Thames Conservancy Act vested in the Corporation of the City of London, who in their turn convey all their interest and title to the conservators under the Act.³

Ownership of
bed and banks
not generally
vested in con-
servators.

Where, however, a river or navigation has been vested by Act of Parliament in a Board of Conservators for the purposes of navigation, if the words of the Act are applicable to the acquisition by the conservators of the right or easement of passage only, and where the acquisition of the soil of the river and its banks is not necessary for the purposes of the Act, the ownership of the soil must be taken not to pass, the Courts not being inclined to infer that a statute of this kind gives more than such a use of the soil as is necessary for the purposes of navigation.⁴

In *The Lee Conservancy Board v. Button*,⁵ the plaintiffs,

¹ *Winch v. Conservators of Thames*, L. R., 9 C. P. 378; L. R., 7 C. P. 471. See *Bath River v. Willis*, 2 Rail. C. 7; 19 Hen. IV. c. 18.

² *Cory v. Bristow*, 2 App. C. 262. As to conservancy, see further Ch. VII.

³ 20 & 21 Vict. c. 147. See *Cory v. Bristow*, 2 App. C. 262; *Watkins v. Milton*, L. R., 3 Q. B. 350; *Forrest v. Greenwich*, 8 E. & B. 390. As to the Thames at Oxford, see *Grant v. Oxford*, L. R., 4 Q. B. 9.

See also *Rex v. Mayor of London*, 4 T. R. 21.

⁴ *Badger v. Yorkshire Rail. Co.*, 5 Jur., N. S. 409; *Hollis v. Goldfinch*, 1 B. & C. 205. See also *R. v. Aire and Calder Navigation*, 9 B. & C. 820; *R. v. Mersey and Irwell Navigation*, 9 B. & C. 95; *R. v. Thomas*, 9 B. & C. 114; *Chelsea Water Co. v. Bowley*, 17 Q. B. 358; *Bruce v. Willis*, 11 A. & E. 463.

⁵ 12 Ch. Div. 383.

Conservators of the River Lee, brought an action to restrain the defendant, who was the owner of property adjoining a towing-path, from using the towing-path for the passage of horses and carts, and the carriage of goods and merchandize, or in any manner inconsistent with the free and convenient navigation of the river. The River Lee Navigation was originally formed in 1570, under an Act of Parliament in the 13th year of Queen Elizabeth; and it was provided therein that the trustees and their successors should have the ground therein set out along the whole length of the navigation for such composition as they should make with the owners and occupiers of the soil and ground. Several other Acts were passed previous to the *7th Geo. III. c. 51*. By that Act trustees were empowered to extend, improve and maintain the navigation, and, amongst other things, to set out and make towing-paths, making compensation for any messuages, &c. which the trustees should adjudge necessary, convenient or proper to become seised or possessed of for the purposes of the Act. The navigation and use of the towing-paths was to be free to the public on payment of tolls; and any person who wilfully damaged or destroyed any banks or other works erected or made for the purposes of the navigation was liable to certain penalties. In 1767, the trustees made a new cut, altering the course of the river, and adapted the towing-path to the alteration. Under powers of the *Act 31 & 32 Vict. c. 154*, the trustees made bye-laws, providing that no person should allow any horse or cattle to trespass on the towing-paths. The defendant bought his property in 1871, and the towing-paths had never been used by his predecessor for horses, carts or carriages; but defendant used the towing-path on the new cut for carting bricks, the effect of which was to cut up and destroy the towing-path, and materially to interfere with the navigation. The defendant alleged that he and his predecessors had always had the soil of the towing-path vested in them, and he did not admit that the plain-

Lee Conservancy Board v. Button.

tiffs had any easement over it ; but even if they had such an easement, they were not entitled to the exclusive use thereof, and had no authority to prevent the towing-path from being used for all lawful purposes,—such as carting lawful goods and merchandize. Malins, V.-C., held that the plaintiffs were entitled by their Acts of Parliament to the freehold of the towing-path, and granted an injunction to restrain the defendant as prayed. On appeal, the Lords Justices varied this decree, holding that by the various Acts of Parliament the plaintiffs did not acquire the freehold of the land forming the towing-path, which remained in the original owners, nor any easement over it, but only the right and the duty to keep it in a fit state for the public to use as a towing-path ; but that, by reason of this right and duty, the plaintiffs were entitled to an injunction to restrain the defendant from so using the towing-path as to interfere with its use by the public for the purposes of navigation.

James, L. J., says : “ Now, *primâ facie*, one would “ suppose that it was not intended that they should have “ any different property in the new cut than that which “ they might have had in the rest of the river Lee. The “ new cut was only a straightening of the bed of the “ river Lee. *Primâ facie*, one would suppose that the “ straightened Lee from one end to the other was to be “ exactly what the unstraightened Lee was ; that is to say, “ a river subject to all the rights of property of the “ riparian proprietors. Then they were to make satisfaction for damages. It is true that there is another clause “ giving power to them, in case it should become necessary for them to become seised of property, to acquire “ the property—that is only when it is necessary for “ them to do so. One would have supposed that it was “ not necessary for them to acquire the soil and freehold “ of the piece of ground, which was either required for “ the canal or for the towing-path, which would be, in “ fact, making an impassable bar between one man’s

“property and another part, which was not at all wanted for the purposes of the navigation. All that was wanted for the purposes of the navigation was, that there should be a good water-highway for the barges, and a good horse-way and foot-path for the horses and men towing the barges. It was not requisite, and it would not be reasonable, that they should acquire anything more than that which has been called an easement; that is to say, that right which Parliament gave to them for the purposes of giving the public the right of way.”

Brett, L. J.: “The Act of Parliament gives them no easement, the Act of Parliament gives them no possession, but it gives them a mere legal right of entry without possession, and it imposes upon them the duty, as long as they take tolls, to keep the towing-paths in such a state that the navigation of the canal, and the use of the towing-path by the public, may not be impeded. Apply that to the case of the towing-path opposite to the defendant’s land, and it leaves him the owner of that land. It is not properly a towing-path opposite his land, but it is a towing-path on his land, and the plaintiffs’ only right being to use that towing-path, and to keep it in a fit state for the public to use it. He has every right over that land which is his own, other than a right to impede the navigation. The only prohibition against him by virtue of the Act is, that the plaintiffs have a right—a duty to see that there is a free towing-path over his land.”

In the case of *Hollis v. Goldfinch*,¹ which was an action of trespass by the conservators of the River Itchen *Hollis v. Goldfinch.* against the defendant, the owner of land adjoining, for cutting trees on the bank of a channel made under their Act (16 & 17 Car. II.), the Court held that the defendant was not liable to an action: for that, first, by the provisions of the Act, the proprietors of the navigation did not

¹ 1 B. & C. 205.

necessarily acquire such an interest in the soil in a bank adjoining to and formed of earth excavated out of the new channel, as to enable them to maintain trespass; and, secondly, that as the purchase of the soil was not necessary for any of the purposes of the Act, it was to be inferred that no such purchase had been made; and, thirdly, that acts of ownership by the proprietors of the navigation upon different parts of the bank contiguous to the new channels, were not admissible in evidence to show that the soil of the bank in question belonged to the proprietors of the navigation.

*Bruce v.
Willis.*

In the case of *Bruce v. Willis*,¹ a canal company were enabled by Act of Parliament to purchase lands, paying full satisfaction; and commissioners were appointed to settle the amount of satisfaction payable in each case, and in certain cases to summon juries to assess damages. Judgments of the commissioners and verdicts of the juries were to be transmitted to the clerk of the peace, and to be deemed records of sessions. By an inquisition, a jury assessed damages at thirty years' purchase for certain lands necessary for making a cut, &c., part of the navigation, and an annual payment was awarded for certain land required for a towing-path. The canal company made a lock, canal, and towing-path on the land aforementioned, but no conveyance was ever executed. The Court held that the Act of Parliament vested the soil used for these works in the canal company without a conveyance.

No duty at
common law
to cleanse
rivers.

There is no common law liability on the owner of the bed of a navigable river or navigation to cleanse it or keep it free of obstructions, or to compensate adjoining owners for damage done by overflow of the water, even in cases where tolls are taken for navigating thereon.² It

¹ 11 A. & E. 463; *R. v. Mersey and Irwell Navigation*, 9 B. & C. 95; *R. v. Thomas*, 9 B. & C. 114. See *Somerset Canal v. Harcourt*, 2 De G. & J. 596; *Reg. v. Archbishop of York*, 14 Q. B. 81; *Patrick v. Beaufort*, 6 Ex. 498; *Robins v. Warwick*,

2 Bing. N. C. 483; *Harborough v. Shadlow*, 7 M. & W. 37; *Dimes v. Grand Junction Canal*, 3 H. L. 794; *Simpson v. Staffordshire Water Co.*, 4 De G., J. & S. 679.

² *Hodgson v. Mayor of York*, 28 L. T., N. S. 836; *Cracknell v. Thet-*

would seem, moreover, that at common law neither the owners of the bed of a navigable river or navigation, nor a board of conservators, are bound to keep the navigation open or in a proper state of repair; but that so long as they choose to keep the navigation open and to take tolls for its use, even where those tolls are not for their own profit, but for the maintenance of the navigation, they are under an obligation to take reasonable care that persons using it are exposed to no undue danger;¹ where no tolls are taken, it has been held that there is no liability to repair or remove obstructions.²

Riparian owners on the banks of tidal navigable rivers, have similar rights and natural easements to those which belong to a riparian proprietor above the flow of the tide, underlying and controlled, but not extinguished by, the public right of navigation.³ These rights do not depend on the ownership of the soil of the stream, but, so far as they relate to a natural stream, exist *jure naturæ*, because the land has by nature the advantage of being washed by the stream. It is, of course, necessary for the existence of a riparian right, that the land should be in contact with the flow of the stream; but lateral contact is as good *jure naturæ* as vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is amply sufficient foundation for a natural riparian right.³

Rights of
riparian
owners.

The various rights of riparian owners will be treated of fully in another chapter,⁴ and it may suffice to say that the owner of the bed of a natural stream has the right to have the water of the stream come to him in its natural state,

ford, L. R., 4 C. P. 629; *Parrett Navigation v. Robins*, 10 M. & W. 593; *Bridge's case*, 10 Rep. 33.

¹ *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; *Parnaby v. Lancaster Canal*, 11 A. & E. 223; *Winch v. Conservators of Thames*, L. R., 9 C. P. 378; L. R., 7 C. P. 456;

Manby v. St. Helens, 2 H. & N. 840.

² *Forbes v. Lec Conservancy*, 4 Ex. Div. 116.

³ *Lyon v. Fishmongers' Co.*, 1 App. C. 662.

⁴ See *post*, Ch. III.

in flow, quantity and quality, and go from him without obstruction, as a right incident to his property, which in no way depends on prescription or the presumed grant of his neighbours.¹ He is entitled to have the water flow to him in its natural state, so far as that is a benefit to him, and is bound to submit to receive it, so far as it is a nuisance to him.² He is entitled, by having a right of access to it, to the reasonable use of the water for his domestic purposes, and for his cattle; and also he may dam it up for a mill or divert it for irrigation, provided he does not interfere with the rights of other riparian proprietors, either above or below him.³

Right of
access.

The most important right, however, belonging to an owner on the banks of a navigable river is the right of access from his land to the river, for the purposes of exercising the public right of navigation; and it may be well here to consider this right more fully.

A public navigable river is a public highway; and where there is a public highway, the owners of land bounded by it have a right to go on the highway from any spot on their own land.⁴ "Unquestionably," says Lord Cairns, "the owner of a wharf on the bank of a public navigable river has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *quod* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But where the right of navigation is connected with an exclusive right of access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, and it becomes a form of enjoyment of the land, and of the river in

¹ *Chasemore v. Richards*, 7 H. L. 382, cited by Cairns, L.C., in *Lyon v. Fishmongers' Co.*, *post*.

² *Per Blackburn, J.*, in *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 582.

³ *Miner v. Gilmour*, 12 Moo. P. C. 131.

⁴ *Blackburn, J.*, in *Marshall v. Uleswater*, L. R., 7 Q. B. 116, see *ante*, p. 35.

“ connection with the land, the disturbance of which may
“ be vindicated in damages or restrained by an injunc-
“ tion.”¹

In the above case of *Lyon v. Fishmongers' Co.*, a suit was brought by the appellant, the owner of a wharf on the Thames. The river bounded this wharf on the south, and a creek of the river on the west. The defendants owned a wharf at the bottom of this creek. The plaintiffs had from time immemorial a right of access to their wharf from both the main river and the creek. In 1857, the Thames Conservancy Act enabled the Conservators of the Thames to grant to owners and occupiers of land fronting the Thames a right to make quays, embankments, &c., in front of their land on payment of fair consideration. The respondents obtained in 1872 a licence to make an embankment in front of their wharf, which had the effect of entirely displacing the water from the above-mentioned creek, and so put an end to the use which had always been made by the occupants of appellant's premises. The appellant filed a bill to restrain the respondents from constructing these works, or obstructing appellant's right of access. Malins, V.-C., granted the injunction prayed for, but the Lords Justices reversed this decree; on appeal, the House of Lords reversed the judgment of the Lords Justices, and confirmed the decree of Malins, V.-C., holding that though the licence of the conservators might be a justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his land, so as to injuriously affect the land of another riparian owner by interfering with his right of access to and from it. “ The
“ taking away of river frontage of a wharf, or the raising
“ of an impediment along the frontage, interrupting the
“ access between the wharf and the river, may,” says Lord Cairns, L. C., “ be an injury to the public right of naviga-

¹ Per Lord Cairns, L. C., in *Lyon v. Fishmongers' Co.*, 1 App. C. 662.

“tion, but it is not the less an injury to the owner of the wharf, which, in the absence of any parliamentary authority, would be compensated by damages, or altogether prevented.”

Interference with, actionable without proof of special damage.

The right of access to a navigable river is, therefore, a right of property distinct from the public right of navigation, an injury to which is actionable without proof of special damage. Thus, in *Rose v. Groves*,¹ where the plaintiff, a riparian owner, had a public-house on the Thames, and complained that the access to and from the river was obstructed by the defendant wrongfully and maliciously placing and keeping timber in the river, so as to drift opposite the plaintiff's house; the Court held, that, as this was an injury to a private right, no proof of special damage, such as loss of custom, was necessary to support the action; and that it was not a question for the jury, whether the plaintiff had sustained special damage, for the injury complained of was not a public one to the navigation, but a private one to the right of access.

A count by owner of a messuage abutting on a navigable river, stating that defendant fixed barges, planks, &c. near the messuage, and hindered the plaintiff in the free use of the river, is good, as sufficiently showing a particular injury; for even if the jury negative actual damage, plaintiff must have judgment. But a count stating plaintiff to be reversioner is bad, while it does not show a permanent injury to the reversion.²

In a late case in the Privy Council, on appeal from the Courts in Canada, it was urged that, on the authority of *Lyon v. Fishmongers' Co.*, every riparian proprietor as such has, beyond his right as one of the public, a right to use a navigable river in a free and uninterrupted manner, so

¹ 5 M. & G. 613; *Dobson v. Blackmore*, 9 Q. B. 991. See also *Wilkes v. Hungerford*, 2 New Cases, 281; 2 Scott, 440; *Iveson v. Moore*, cited in *Chichester v. Lethbridge*,

Willes, 74; *Herbert v. Groves*, 1 Esp. N. P. C. 148; *Finéux v. Hoveden*, Cro. Eliz. 664.

² *Dobson v. Blackmore*, 9 Q. B. 991.

that any obstruction placed in it would be an invasion of a private right for which an action would lie without proof of special damage. Their Lordships, however, were of opinion that this decision could not be pressed to such an extent; but that it would be a question of fact to be determined by the circumstances of each case, whether an obstruction amounts to an interference with the right of access to the river frontage.¹

The right of access is, moreover, a portion of the valuable enjoyment of land on the banks, and any works which take it away have been held to be an "injurious affecting of the land," so as to give a right to compensation under the Lands Clauses Consolidation Act. In the case of *Duke of Buccleuch v. Metropolitan Board of Works*,² compensation was given for the loss of the use of a causeway over the bed of the Thames, giving access to the river at low water from appellant's garden; and in *The Metropolitan Board of Works v. McCarthy*,³ appellant was held entitled to compensation for loss of access from his house to a dock which was open to the public. The claim in these cases was founded on an injury to an interest in land, whereby the land was rendered less valuable; and, therefore, where an occupier of premises had been used to draw water from the river and to use a public drawdock merely as public rights, and not as rights connected with his premises, it was held that he could not recover for an interference with such rights.⁴

In the case of *A.-G. v. Conservators of the Thames*,⁵ the obstruction was held to be, if an obstruction at all, an obstruction to the navigation, and not to the public right of access. In a late case the Master of the Rolls has held

¹ See further as to law of Canada, *Mayor of Montreal v. Drummond*, 1 App. C. 384; 35 L. T., N. S. 106; *Brown v. Gregg*, 2 Moo. P. C. 341; 10 L. T., N. S. 45.

² L. R., 5 H. L. 418.

³ L. R., 7 H. L. 243.

⁴ *Reg. v. Metropolitan Board of Works*, L. R., 4 Q. B. 358. See *Beckett v. Metropolitan Board of Works*, L. R., 3 C. P. 82; 17 L. T., N. S. 499.

⁵ 1 Hem. & M. 1. See also *Kearns v. Cordwainers' Co.*, 6 C. B., N. S. 388.

Compensation for loss of, under 8 & 9 Vict. c. 18.

that a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purposes of loading and unloading at reasonable times, and for a reasonable time; and that the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his premises; but that such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises, if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock by other vessels.¹

Right to land
and cross the
shore as inci-
dent to the
right of access.

It would appear that, as a necessary incident to the right of access, there must be the right of landing and of passing over the shore at low water for that purpose, even when such shore is private property.²

In the case of *Marshall v. Ulleswater Co.*,³ it was held that persons having a right to navigate on a navigable lake were entitled to pass over a pier belonging to plaintiff, the owner of the soil of the bed of the lake, which had been wrongfully erected on the soil of the lake by a third party, but was maintained by plaintiff, and which prevented persons having a right of access from coming down to the brink of the lake for the purposes of going on it to exercise the public right of navigation. Though this decision would, strictly speaking, only apply to a tidal river when the tide was high; it is submitted that, as the principle of the decision is rested in the necessity of the right of passage over the property of another as incident to the

¹ *Original Hartlepool Colliers v. Gibb*, 8 Ch. Div. 713.

² "Independently of authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties

"when an attempt is made to do fine the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Per Wood, V.-C., in *A.-G. v. Conservators of Thames*, 1 Hem. & M. 1. As to this see more fully *ante*, p. 33.

³ L. R., 7 Q. B. 166.

public right of navigation, and as the public right of navigation exists at all times and states of the tide,¹ and is paramount to all private rights of property in the bed of the river,² it would be absurd to limit the right of passage to the period when the shore was covered with water, and hold such passage illegal when the shore is dry.

The right of fishery in estuaries and arms of the sea, and in navigable tidal rivers, so far as the tide flows and reflows, is *primâ facie* common to all the subjects of the realm.³ It seems somewhat doubtful whether this right is to be considered as belonging to the public of common right, or whether they derive it from the Crown as owner of the bed and soil of tidal waters.⁴ This public right cannot exist at law in non-tidal waters, even though navigable, the right of navigation giving no right to fish.⁵ The right of fishing includes the right to take shell fish,⁶ and may be carried on by lawful nets.⁷

Public right
of fishery.

Though the right of fishing in tidal waters is *primâ facie* in the public, yet the right to exclude the public therefrom and to create a several and exclusive fishery existed in the Crown, and might lawfully have been exercised by the Crown before Magna Charta.⁸ The Crown cannot now exclude the public or create a several fishery,⁹ and therefore all claims to a several fishery in a tidal river must now be supported by proof of a grant or by immemorial custom or prescription, such as will raise the presumption of such a grant, and from which such a grant will be inferred, in the absence of any evidence to show that its origin was modern.¹⁰

Several
fishery.

¹ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

³ *Malcolmson v. O'Dea*, 10 H. L. 593; *Crichton v. Colley*, 19 W. R. 167; *Carter v. Murcott*, 4 Burr. 2163; *Fitzwalter's case*, 1 Mod. 106.

⁴ See Woolrych on Waters, p. 76; *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361; *Murphy v. Ryan*, L. R., 2 C. L. 143.

⁵ *Murphy v. Ryan*, *supra*; *Musset v. Burch*, 35 L. T., N. S. 486; *Hargreaves v. Diddams*, L. R., 10 Q. B. 587.

⁶ *Bagot v. Orr*, 2 Bos. & Pull. 472.

⁷ *Warren v. Mathews*, 6 Mod. 73.

⁸ *Malcolmson v. O'Dea*, 10 H. L. 593.

⁹ *Warren v. Mathews*, *supra*.

¹⁰ *Edgar v. Commissioners of Fisheries*, 28 L. T., N. S. 732.

A several fishery in a public navigable river is subject to the public right of navigation, and a grantee takes subject to this right, and cannot make any claim or demand, even if expressly granted to him, which in any way interferes with this right.¹

The right of the Crown to exclude the public from their common right of fishing, and to create a several exclusive fishery in a subject was formerly a part of the royal prerogative; and although this right is said in the cases above cited to arise from the ownership of the Crown of the bed of the river, yet such a fishery may exist in a subject, apart from the ownership of the soil of the bed, as an incorporeal hereditament.² As the two rights are thus divisible, it would appear that the grant of a portion of the soil of the bed of a tidal river will not necessarily pass a several fishery in the part granted, though it may do so, if the words of the grant admit of such a construction;³ and further that the grant of a several fishery in a tidal river will not of itself pass a right to the soil, though it may, if coupled with sufficient words or accompanied by acts of ownership, be evidence that the soil was intended to be passed.⁴

Private Rivers and Streams.

Definition.

All rivers and streams above the flow and reflow of the tide are *prima facie* private, though many have become by immemorial user or by Act of Parliament subject to the public rights of navigation. Where a river has by immemorial user or by an Act of Parliament, which does not expressly affect the rights of the soil, become subject to the public right of navigation, none of the incidents attaching to a navigable river up to the flow and reflow of

¹ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

² *Duke of Somerset v. Fogwell*, 5 B. & C. 884.

³ *Scrutton v. Brown*, 4 B. & C.

485; *R. v. Ellis*, 1 M. & S. 652; *Gray v. Bond*, 5 Moo. 527.

⁴ *Duke of Somerset v. Fogwell*, *supra*. As to Fishery, see *post*, Ch. VI.

the tide can properly attach.¹ The right of navigation gives no right of property,² nor of fishing.³

When the lands of two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is *primâ facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aquæ*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land.⁴ Where the same person is the proprietor of the ground on both sides of the stream, he is *primâ facie* the proprietor of the whole of the channel.⁵ This presumption is liable to be rebutted, but if not rebutted it is the legal presumption.

Ownership of
soil of bed.

The more than ordinary breadth of a river does not prevent a conveyance of premises therein described as bounded by the river from operating to convey the portion of the bed and soil of the river abutting thereon up to mid-stream; and therefore a conveyance of one hundred and twenty acres of land on the banks of a river was held to convey also ten acres of the bed of the river, although the estimate of one hundred and twenty acres was satisfied by the contents of the land, exclusive of the bed of the river.⁶ A grant by the Crown of land bounded by a non-navigable creek has been held to pass the soil of the creek *ad medium filum aquæ*, as the description of the boundaries

¹ *Murphy v. Ryan*, Ir. R., 2 C. L. 148; *Musset v. Burch*, 35 L. T., N. S. 486; *Hargreaves v. Diddams*, L. R., 10 Q. B. 582.

² *Orr Ewing v. Colquhoun*, 2 App. C. 839.

³ *Hargreaves v. Diddams*, L. R., 10 Q. B. 582.

⁴ *Bickett v. Morris*, L. R., 1 Sc.

App. 47; *Wishart v. Wyllie*, 1 McQ., H. L. 389; *Carter v. Murcott*, 4 Burr. 2162; *Reg. v. Inhabitants of Landulph*, 1 Moo. & R. 393; *R. v. Wharton*, 12 Mod. 510.

⁵ See *Orr Ewing v. Colquhoun*, 2 App. C. 856.

⁶ *Dwyer v. Rich*, Ir. R., 4 C. L. 424.

in the grant did not exclude from it that portion of the creek which by the general presumption of the law would go along with the ownership of the land on the banks of it.¹

When a river
changes its
course.

When a stream changes its course by slow and imperceptible steps, the riparian owners are obliged to accept the consequent alteration in their boundaries; but when the shifting is sudden and well-marked, the original *medium flum* continues to be the border line, and the stream so far passes entirely within the land of the one proprietor.² Land, therefore, gained gradually and imperceptibly from a stream belongs by accretion to the owner of the adjoining soil, who must also bear gradual and imperceptible loss from the same cause.³

Where, however, a river suddenly changes its course, the property remains as before according to the former bounds.⁴

Where a river had formerly flowed wholly within the lands of one proprietor, and by gradual and imperceptible degrees wore away its banks, and approached and eventually encroached upon the land of the defendant, a proprietor adjoining, it was held that as the former proprietor originally owned the whole of the bed, he had not lost his property in it by the gradual change of the course of the river, and could maintain an action of trespass against the defendant for fishing on a strip of the bed which before the encroachment had been his (defendant's) property.⁵

Islands.

Where a river is bisected into two courses by an island in its middle, the *medium flum* for boundary purposes is that which bisects the island; but if the island be nearer to one side than the other, it appears that, in America at

¹ *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473. See also *Crossley v. Lightowler*, L. R., 3 Eq. 279.

² *Phear, Rights of Water*, 12; *Mayor of Carlisle v. Graham*, L.

R., 4 Ex. 361; *Ford v. Lacy*, 7 H. & N. 151.

³ See *ante*, p. 62 *et seq.*

⁴ *Ford v. Lacy*, 7 H. & N. 151.

⁵ *Foster v. Wright*, 4 C. P. D. 438.

least, where such cases have been much considered, no account is taken of the smaller branch—the other alone represents the river, and its *medium filium* constitutes the *primâ facie* line of division.¹ If an island is formed by natural causes, the property in it remains apportioned in the same manner as was before its appearance the property in the soil on which it stands.²

Though the owner of land on the banks of a non-tidal river is *primâ facie* the owner of half the bed, yet this is but a presumption, and may be rebutted;³ and it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishing therein, be specially conveyed and appropriated to a third person, whether he have land or not on the borders thereof or adjacent thereto.⁴

Though the soil of the *alveus* of non-tidal rivers is the property *primâ facie* of the respective owners on the opposite sides of the river, neither of them is entitled to use it in such a manner as to interfere with the natural flow of the stream, to the injury of the other riparian owners, or of any right of navigation which has been acquired by the public.⁵ Subject to this restriction they are entitled to protect their property from the invasion of the water, by building a bulwark, *ripæ muniendæ causâ*; but even in this necessary defence of themselves they are not at liberty to conduct their operations so as to do any actual injury to the property on the opposite side of the river.⁶

Though rivers above the flux and reflux of the tide are *primâ facie* private rivers, yet the public may acquire a right or easement to navigate such waters by express

Rights of
owners of
bed.

Right of
navigation.

¹ Phear, p. 11; Angell, Tide Waters, 42.

² *Ib.*; Angell, Tide Waters, 43.

³ *Bloomfield v. Johnson*, L. R., 8 C. L. 104.

⁴ *Marshall v. Ulleswater*, 3 B. & S. 732; see *Bristowe v. Cornican*, 3

App. C. 668.

⁵ *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Bickett v. Morris*, L. R., 1 Sc. App. 47.

⁶ *Bickett v. Morris*, *sup.*, per Lord Chelmsford. See *ante*, p. 73 *et seq.*, and *post*, Ch. III.

grant, or dedication by immemorial user, which presumes a grant, or by Act of Parliament. Where such right has been acquired, the obstruction of it is a public nuisance and indictable in the same way as it is in tidal rivers.

This right of navigation is simply a right of way, similar to the right the public have to passage along a public road or footpath—a right for those persons who may require the use of it to pass as fully and freely and as safely as they have been wont to do.¹ From this it would appear that this easement differs from the public right of navigation in the sea and tidal waters: for whereas, in the latter, the right is a right unlimited to pass in all parts of the channel, at all times, and in all species of vessel;² in the former, the right would seem to be limited to the extent of the grant or user proved.

The public who have acquired the right to navigate on an inland water have no right of property in the bed.³ This right of navigation does not carry with it the right of public fishery; for it has been held that neither in the case where a non-tidal river has been navigated from time immemorial,⁴ nor in the case where a river has been made navigable by Act of Parliament,⁵ has the Crown any right to the soil, or the public to the fishery, which still remains private.

Obstruction
of, a public
nuisance.

It appears that the king has an interest of jurisdiction to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and great vessels, but also for smaller, as barges and boats, to reform the obstruction or annoyance that are therein to such common passage.⁶

Fishery.

The right of fishery being a right of property, the pre-

¹ *Orr Ewing v. Colquhoun*, 2 App. C. 839.

² *R. v. Randall*, Car. & M. 496, per Wightman, J.

³ *Orr Ewing v. Colquhoun*, *supra*.

⁴ *Murphy v. Ryan*, Ir. R., 2 C. L. 68.

⁵ *Hargreaves v. Diddams*, L. R., 10 Q. B. 582; *Musset v. Burch*, 35 L. T., N. S. 486.

⁶ *Hale de Jure Maris*, c. 2; *Williams v. Wilcox*, 8 A. & E. 333, per Lord Denman, C. J.

sumption is that each owner of land abutting on a non-tidal stream has the right of fishing in front of his land¹ *usque ad medium filum aquæ*; and where a man possesses land on both sides of the water, he has the sole right of fishing.

"According to the well-established principles of the common law," says O'Hagan, J., "the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moiety to a supposed line in the middle, constituting their legal boundary, and being so possessed have an exclusive right to the fishery in the water which flows above their respective territories."² This presumption, as has been said, holds good in private rivers, though subject to the public right of navigation, and a claim by the public to fish in such water has been held such a claim as cannot exist at law.³

If the lord of a manor would intrude his claim, he must make it out by evidence of his own,—as by deed. But the presumption that a several fishery passed to the lord as appurtenant to a manor under a deed is rebutted by proof that before the date of the deed the owners of land within the manor had the right of free fishery.⁴

The owner of land on a river may grant the right of fishing to another—either exclusively, in which case the fishing is called a several fishery, or not excluding himself, in which case it would be called a free fishery. In both cases the fishery is an incorporeal hereditament, and can only pass by deed⁵. A valid licence to fish exclusively for a time certain, even for an hour, must be by deed.⁶ Where a man has a several fishery, the presumption is that he has also the soil.⁷

¹ *Lamb v. Newbiggen*, 1 Car. & K. 549; Hale de Jure Maris, 1.

² *Murphy v. Ryan*, Ir. R., 2 Ch. 148. See also *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361, and *Bristowe v. Cormican*, L. R., 3 App. C. 641.

³ *Hargreaves v. Diddams*, L. R., 10 Q. B. 587; *Musset v. Bureh*, 35 L. T., N. S. 486; *Hudson v. McCrae*,

4 B. & S. 585.

⁴ *Lamb v. Newbiggen*, 1 Car. & K. 549. See also *Grand Junction Canal v. Ashby*, 7 H. & N. 403.

⁵ *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

⁶ *Holford v. Bailey*, 18 Q. B. 426.

⁷ See *post*, *Marshall v. Ulleswater Co.*, 3 B. & S. 732; *Bloom-*

Lakes and Pools.

Definition.

A pool is defined by *Callis* as, "a mere standing water, "with no current at all;" and is distinguished from a pond as being a work of nature, and not of art.¹

"A pond," says *Angell*, "is a lake of small size. The "outlet of a lake may be a river, but the lake does not "lose its distinctive character, because there is a current "in it for a certain distance tending towards its outlet."²

Ownership of soil.

It does not appear that by the English law there is any difference as to the ownership of the soil between land covered with still and running water, except perhaps in the case of large inland lakes or seas, where the rule that the adjoining riparian owner is owner *ad medium flum aquæ*, might cause inconvenience. Where, therefore, a lake or pool lies wholly within, and is surrounded by, a manor or estate, the presumption is, that the owner of the manor or estate is also the owner of the soil of the lake; and where the boundary of two properties passes along the pool, it is taken to coincide with the *medium flum* of the pool; although, of course, it may be proved expressly to have some other direction.³

In large navigable lakes.

With regard to the large inland lakes in this country, the law seems less settled, though several modern cases have removed much of the doubt hitherto felt with regard to them. In the case of *Bristow v. Cormican*,⁴ the House of Lords have held that the Crown has no *de jure* right to the soil and fisheries of large non-tidal navigable lakes, such as Lough Neagh in Ireland; Cairns, L. C., remarking that he was not aware of any rule which would *primâ facie* connect the soil or fishing with the Crown, or disconnect them from the private ownership either of riparian proprietors or others. So far the case is clear, but it is left in

field v. Johnson, Ir. R., 8 C. L. 105. As to Fishery, see *post*, Ch. VI.

¹ *Callis* on Sewers, p. 82; *Woolrych* on Sewers, p. 80.

² *Angell* on Watereourses, p. 8.

³ *Phear*, Rights of Water, p. 1. See *Woolrych*, p. 121.

⁴ 3 App. C. 641. As to American law, see *Angell's Watercourses*, § 41.

doubt whether the presumption of ownership *ad medium filum aquæ*, which exists with regard to owners of land on the banks of non-tidal streams of running water, exists also on large navigable lakes. In the judgment of Lord Blackburn this question is touched upon, and though the particular point was not necessary for the decision of the case, it may be well to cite at some length the words of the very learned lord. “The property in the soil of the sea
“and estuaries, and of rivers in which the tide ebbs and
“flows, is *primâ facie* of common right vested in the
“Crown, but the property of dry land is not of common
“right in the Crown. It is clearly and uniformly laid
“down in our books, that where the soil is covered with
“water, forming a river in which the tide does not flow,
“the soil does of common right belong to the owners of
“the adjoining land; and there is no case or book of
“authority to show that the Crown is of common right
“entitled to land covered by water, where the water is not
“running water forming a river, but still water forming a
“lake. In *Marshall v. The Ulleswater Steam Navigation*
“*Co.*,¹ it is true that Mr. Justice Wightman, in delivering
“the judgment of the majority of the Queen’s Bench, says,
“‘Whether the soil of lakes, like that of fresh water rivers,
“‘*primâ facie* belongs to the owners of the land or of the
“‘manors on either side *ad medium filum aquæ*, or whether
“‘it belongs *primâ facie* to the king in right of his preroga-
“‘tive,² it is not in this case necessary to determine; for it
“‘is clear upon the authorities that the soil of land covered
“‘with water may, together with the water and the right
“‘of fishing therein, be specially appropriated to a third
“‘person, whether he has land or not on the borders
“‘thereof, or adjacent thereto.’ This is the only case cited,
“and, as far as I can find, the only case which exists
“where there is even a suggestion that the Crown of
“common right is entitled to the soil of lakes. Neither

¹ Ibid. p. 665.

² Com. Dig. Prerogative (D. 50);
Hale de Jure Maris, c. 19.

“ the passage in Comyns, nor that in *Hale de Jure Maris*,
 “ cited by Mr. Justice Wightman, gives any countenance
 “ to such a doctrine. But it does appear that the learned
 “ judge did not think that the law as to land covered by
 “ still water was so clearly settled to be the same as the
 “ law as to land covered by running water, as to justify
 “ him in unnecessarily deciding that it was the same; I
 “ own myself to be unable to see any reason why the law
 “ should not be the same, at least where the lake is so
 “ small, or the adjoining manor so large, that the whole
 “ lake is included in one property. Whether the rule
 “ that each adjoining proprietor, where there are several,
 “ is entitled *usque ad medium flum̄ aquæ* should apply to a
 “ lake, is a different question. It does not seem con-
 “ venient that each proprietor of a few acres fronting on
 “ Lough Neagh, should have a piece of the soil of the
 “ lough, many miles in length, tacked on to his frontage.”
 In America this question has been of more importance
 than in this country, but the decisions of the different
 States vary considerably; and with regard to the great
 lakes, the question has been considered more in a terri-
 torial and natural, than in a legal point of view.¹ In this
 country there are but few cases on the subject. In the
 case of *Lord v. Commissioners of Sydney*, cited before, it
 was held that a grant by the Crown of lands bounded by
 a non-navigable creek passed the soil *usque ad medium*
flum̄ aquæ.²

In *Bloomfield v. Johnson*,³ the Irish Court of Exchequer
 Chamber, reversing the judgment of the Court of Com-
 mon Pleas, has held that a grant from King James I.,
 who was the owner of the whole soil and bed of Lough
 Erne, of lands adjacent to the lake, with certain islands
 in it, and also a free fishery in the lakes, and all waters,

¹ See per Dowse, B., in the same
 case in the Irish Court of Exche-
 quer, Ir. R., 10 C. L. 412, and
 per Whiteside, C. J., in *Bloomfield*
v. Johnson, Ir. R., 8 C. L. 89;

Angell on Tide Waters, p. 76.

² 12 Moo. P. C. 473. See *ante*,
 pp. 71, 72.

³ Ir. R., 8 C. L. 89.

watercourses, fisheries, &c. within the same, did not pass the soil of the lake, distinguishing the case from that of *Lord v. Commissioners of Sydney*, on account of the size and navigability of the lake; and Fitzgerald, B., was of opinion that, assuming that the presumption that by a grant of lands adjacent to a fresh water river (the grantees being the owners of the soil of the river) the soil of the river passes *ad medium filum aquæ*, applied to such lakes as Lough Erne, the grant of a free fishery when a several and exclusive fishery might have been granted was sufficient to rebut the presumption that the soil was intended to pass *ad medium filum aquæ*. In *Marshall v. Ulleswater*, the plaintiff, who proved a grant to him of a several and exclusive fishery in the Lake of Ulleswater, was held on that account to be the owner of the soil of the lake; the majority of the Court, however, expressing a doubt whether the soil of lakes, like fresh water rivers, belonged *primâ facie* to the adjoining owners or to the Crown.¹

There seems no doubt but that the public may acquire Navigation. a right of navigation in a non-tidal lake in the same way as on a non-tidal river.²

In pools and small non-navigable lakes, the right of Fishing. fishing of course belongs *primâ facie* to the riparian owners *ad medium filum aquæ*. It seems somewhat doubtful, however, whether this presumption extends to large navigable lakes, or whether a public right of fishery may not exist in such waters. The Irish Court of Exchequer Chamber have held, in the case of *Bloomfield v. Johnson*,³ that the public right of fishery cannot exist in non-tidal navigable lakes; and in the subsequent case of *Bristow v. Cormican*,⁴ the Irish Court of Exchequer held that they were bound by this decision; but the judges in this case, both in

¹ 3 B. & S. 732. See also *Reg. v. Barrow*, 34 Justice of Peace, p. 53.

² See *Marshall v. Ulleswater Co.*, 3 B. & S. 732; *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68; *Bristow v.*

Cormican, 3 App. C. 641; *Marshall v. Ulleswater Co.*, L. R., 7 Q. B. 582; and *post*, Ch. VII.

³ Ir. R., 8 Ch. 68.

⁴ Ir. R., 10 C. L. 398, 412.

the Court of Exchequer and in the Court of Exchequer Chamber, strongly dissented from this view of the law, though without overruling it. The case went to the House of Lords on another ground; and their lordships, though not deciding the point, seem doubtful as to whether the decision in *Bloomfield v. Johnson* could be supported.¹

Artificial Watercourses.

Ownership of
soil of.

We have spoken hitherto exclusively of natural bodies of water flowing *ex jure* natural from the earth; but it is necessary to add a few words with regard to watercourses which owe their existence to artificial means. Where an artificial watercourse is made by a man on his own land, of course no question as to the ownership of the soil of it, or the rights over it, can arise; but the case will be different where such a watercourse is made on the land of another. In such a case the right to the watercourse can only be created by grant or by long continued enjoyment, from which the existence of a former grant may be reasonably presumed,² or by Act of Parliament.³ "A grant of "a watercourse in law may," says Jessel, M. R., "mean "one of three things, especially when coupled with other "words. It may mean the easement, or the right to the "running of water; and it may mean the channel, pipe "or drain which contains the water; and it may mean the "land over which the water flows. Which it does mean "must be shown by the context; and if there is no con- "text, I apprehend that it would not mean anything but "the easement or right to the flow of the water."⁴ The right, therefore, to the ownership of the bed of such watercourses depends entirely on the words of the instrument which creates them, interpreted according to the

¹ 3 App. Cas. 641. See also *Reg. v. Barrow*, 34 Just. of Peace, 53; and *post*, Ch. VI.

² See *Rameshur Singh v. Koonj Behari Pattuck*, 4 App. Cas. 121.

³ See *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 586, per Cockburn, C. J.

⁴ *Taylor v. St. Helens*, 6 Ch. D. (C. A.) 264.

usual rules of construction.¹ The most important of these artificial watercourses—viz. canals, sewers, and waterworks—are wholly the creatures of statute; and the rights of property in them of course depend on, and are regulated in each case by, the individual statute to which it owes its origin, and by those statutes which apply to such works generally. The full consideration of such artificial watercourses will be given in a later chapter.²

¹ *Badger v. Yorkshire Rail. Co.*, 5 Jur., N. S. 459.

rights in artificial watercourses, see Ch. IV.

² See *post*, Ch. V.; and as to

CHAPTER III.

OF NATURAL RIGHTS OF WATER, AND THEREIN OF THE
DUTIES OF RIPARIAN OWNERS.*Natural Rights and Duties of Riparian Owners.*

Riparian
rights gene-
rally.

HITHERTO we have treated almost exclusively of the ownership of the soil over which water flows, and of those rights incident to and arising out of the ownership of such soil. In the present Chapter we purpose to consider what are usually termed riparian rights, or rights of proprietors of land on the banks of streams, arising, strictly speaking, not from the ownership of the bed over which the water flows, but from the right of access which such proprietors have to the water. In the case of non-tidal waters, where the owner of land on the banks is *primâ facie* owner of half the bed, this may appear a fine-drawn distinction; but on the banks of tidal waters, where the ownership of the bed is *primâ facie* in the Crown, the distinction will be manifest,—as the origin of such rights cannot be referred to ownership of the bed.

Founded on
the right of
access to the
stream.

“ With respect to the ownership of the bed of the “ river,” says Lord Selborne in *Lyon v. Fishmongers’ Company*,¹ “ this cannot be the natural foundation of “ riparian rights properly so called, because the word “ ‘ riparian ’ is relative to the bank, and not to the bed, of “ the stream ; and the connection, when it exists, of “ property on the bank with property in the bed of the “ stream depends not upon nature, but on grant or “ presumption of law. In some tidal navigable rivers (as

¹ 1 App. Cas. 683.

“ the Severn), parts of the bed of the tidal stream belong
 “ to riparian owners ; and it appears from Mr. Angell’s
 “ book (often quoted in our Courts), that in Pennsylvania
 “ and Alabama, States whose jurisprudence is founded
 “ generally on English law, the whole property in the
 “ beds of large non-tidal navigable rivers is in the State.
 “ The title to the soil constituting the bed of a river does
 “ not carry with it any exclusive right of property in the
 “ running water of the stream, which can only be appro-
 “ priated by severance, and which may be lawfully so
 “ appropriated by everyone having a right of access
 “ to it.”

The principles of law to be hereafter stated apply to all watercourses flowing in a certain and definite channel, whether above or below ground ; for if the course of a subterranean stream be well known, the rights with regard to it will be the same as if it had been wholly above ground. But waters, whether above or below ground, having no certain course or defined limits, such as those merely percolating through the strata of the earth, and those diffused over its surface, are not watercourses, nor are they subject to the law of watercourses.¹ The law relating to percolating water, and water without a defined course, will be considered at the end of this Chapter.

Only exist as
to waters
flowing in a
defined
channel.

It is manifest that the property of riparian owners may exist on the banks of tidal navigable rivers as well as on non-navigable streams. Riparian owners on the former have similar rights and natural easements to those belonging to riparian proprietors above the flow of the tide, underlying and controlled, though not extinguished, by the public right of navigation.² This latter right the proprietor on a navigable river enjoys, “superadded to “his riparian rights.” His riparian rights are subordinated to the public right “in this respect, that whereas

Rights on
navigable and
non-navi-
gable rivers
identical, save
where con-
trolled by
public right
of navigation.

¹ *Chasemore v. Richards*, 7 H. L. 349 ; *Acton v. Blundell*, 12 M. & W. 324 ; *Dickenson v. Grand Junction Canal*, 7 Ex. 282. For defini-

tion of a “Watercourse,” see *ante*, p. 31.

² *Lyon v. Fishmongers’ Company*, 1 App. Cas. 662.

“in a non-navigable river all the riparian owners might combine to divert or pollute or diminish the stream; in a navigable river, the public right of navigation would intervene and prevent this being done.”¹

Contact necessary.

“It is of course,” says Lord Selborne,² “necessary to the existence of such riparian rights that the land should be in contact with the flow of the stream, but lateral contact is as good *jure naturæ* as vertical, and not only the word ‘riparian,’ but the best authorities, such as *Miner v. Gilmour*,³ and Lord Wensleydale in *Chasemore v. Richards*,⁴ state the doctrine in terms which point to

In tidal rivers.

“lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right.”

Natural right to water not an easement.

A watercourse may be either natural or artificial, and the rights of the riparian proprietors on the banks thereof are in the one case a corporeal, and in the other an incorporeal right. The right to the use of the flow of the water in its natural course, and to the momentum of its fall on the land of the proprietor, is not what is called an easement, because it is inseparably connected with and inherent in the property in the land: it is parcel of the inheritance, and passes with it.⁵

Artificial watercourses.

Where a stream is artificial, that is, does not arise *ex jure naturæ* from the soil, or flows in channel cut by artificial means through the lands of adjoining proprietors, the rights of such proprietors are not *primâ facie* the same as those of proprietors on the banks of natural streams.

¹ *Lyon v. Fishmongers' Company*, 1 App. Cas. 662, per Lord Cairns, L. C. Compare *Orr Ewing v. Colquhoun*, 2 App. Cas. 656.

² *Lyon v. Fishmongers' Company*, 1 App. Cas. 683.

³ 12 Moo. P. C. 131.

⁴ 7 H. L. C. 349.

⁵ Angell on Watercourses, pp. 96, 98; Woolrych on Waters, p. 146.

The mutual rights of the parties in such cases are not natural, but acquired rights, and are dependent for their existence entirely on the words of the grants by which they have been acquired, or on the nature of the user, which can be proved if the claim is by prescription.¹ A watercourse, however, though an artificial one, may have been made under such circumstances as to confer all such rights as a riparian owner would have had in the case of a natural stream.² Moreover, the natural rights to water are liable to be abridged, enlarged or modified in many ways by grant or prescription. Thus, a right may be acquired to throw back upon the land of the proprietor higher up the stream the water which, unless so reflected, would by the force of gravity pass from it; or to discharge the water upon the land lying lower down the stream rather injured in quality, or with a degree of force greater or less than the natural current.³ All such acquired rights are termed easements. It is purposed in the present chapter to consider the natural rights of water only, leaving to a subsequent chapter all acquired rights.⁴

Acquired
rights.

"The subject of right to streams of water flowing on the surface," says Lord Wensleydale,⁵ "has been of late years fully discussed, and, by a series of carefully considered judgments, placed upon a clear and satisfactory footing. It has been settled that the right to the enjoyment of a natural stream of water on the surface *ex jure naturæ* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself; and that he is entitled to the benefit of it, as he is to all the other advantages belonging to the land of which he is

Rights in na-
tural streams,

not founded
on occupancy.

¹ Phear, *Rights of Water*, p. 39.

² See *post*, *Wood v. Waud*, 3 Ex. 748; *Sutcliffe v. Booth*, 4 Jur., N. S. 1057.

³ *Sampson v. Hoddinot*, 1 C. B., N. S. p. 611. See *Gale on Easements*, p. 270; *Goddard on Ease-*

ments, p. 53.

⁴ *Post*, Ch. IV.

⁵ *Chesmore v. Richards*, 7 H. L. 382. See also *Embrey v. Owen*, 6 Ex. 353; *Sampson v. Hoddinot*, 1 C. B., N. S. 590; *Mason v. Hill*, 5 B. & A. 1; *Wright v. Howard*, S. & St. 190.

“ the owner. He has the right to have it come to him in
 “ its natural state, in flow, quantity and quality, and to
 “ go from him without obstruction, upon the same prin-
 “ ciple that he is entitled to the support of his neighbour’s
 “ soil for his own in its natural state. His right no way
 “ depends on prescription or the presumed grant of his
 “ neighbour.”

It was at one time contended that a title to the use of running water was not a right of property; but that water was *publici juris*, and, as such, the right to use it could only be acquired by occupancy. This view seems to have been favoured by Blackstone,¹ and there are dicta in some of the earlier cases² to the effect that by the law of England the possessor who first appropriates any part of water flowing through his land to his own use, has a right to use so much as he has appropriated as against the world. The cases of *Mason v. Hill* and *Embrey v. Owen* have now, however, finally negatived this contention.

Mason v. Hill. In *Mason v. Hill*,³ Lord Denman, delivering the judgment of the Court of King’s Bench, says, “ The proposition for which the plaintiffs contend is that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for any purpose of his own, not inconsistent with a similar right in the proprietors of the land above and below; that neither can any proprietor above diminish the quantity or injure the quality of water which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant; and that whether the loss by diversion of the general benefit of such stream be or be not such an injury in point of law as to sustain an action without some special damage, yet as soon as

¹ 2 Black. Com. 402.

C. 913; *Liggins v. Inge*, 7 Bing. 692.

² *Williams v. Moreland*, 2 B. &

³ 5 B. & A. 1.

“ the proprietor of land has applied it to some purposes of
“ utility, or is prevented from so doing by the diversion,
“ he has a right of action against the person diverting.
“ The proposition of the defendant is, that the right to
“ flowing water is *publici juris*, and that the first person
“ who can get possession of the stream and apply it to a
“ useful purpose, has a good title to it against all the
“ world, *including* the proprietor of the land below, who
“ has no right of action against him unless such proprietor
“ has already applied the stream to some useful purpose
“ also, with which the diversion interferes; and in default
“ of his having done so, may altogether deprive him of the
“ benefit of the water. The position that the first occupant
“ of running water for a beneficial purpose, has a good
“ title to it, is perfectly true in this sense, that neither the
“ owner of the land below can pen back the water, nor the
“ owner of the land above divert it to his prejudice. In
“ this, as in other cases of injuries to real property, pos-
“ session is a good title against a wrongdoer, and the
“ owner of the land who applies the stream that runs
“ through it to the use of a mill newly erected, or other
“ purposes, if the stream is diverted or obstructed, may
“ recover for the consequential injury to the mill; *The*
“ *Earl of Rutland v. Bowler*.¹ But it is a very different
“ question whether he can take away from the owner of
“ the land below, one of its natural advantages, which is
“ capable of being applied to profitable purposes, and
“ generally increases the fertility of the soil even when
“ unapplied, and deprive him of it altogether by antici-
“ pating him in its application to a useful purpose. If
“ this be so, a considerable part of the value of an estate,
“ which, in manufacturing districts particularly, is much
“ enhanced by the existence of an unappropriated stream
“ of water with a fall, within its limits, might at any time
“ be taken away; and by parity of reasoning, a valuable

¹ Palmer, 290.

“ mineral or brine spring might be abstracted from the
 “ proprietor in whose land it arises, and converted to the
 “ profit of another. We think that this proposition has
 “ originated in a mistaken view of the principles laid
 “ down in the decided cases of *Bealey v. Shaw*,¹ *Saunders*
 “ *v. Newman*,² *Williams v. Moreland*.³ It appears to us
 “ also that the doctrine of Blackstone and the dicta of
 “ learned judges, both in some of those and in the case
 “ of *Cox v. Mathews*,⁴ have been misconceived.” The
 learned judge proceeds to discuss the above cases, and the
 passage in Blackstone,⁵ and the Roman law⁶ on the
 subject, and then continues, at p. 24: “ From these
 “ authorities, it seems, that the Roman law considered
 “ running water, not as *bonum vacans*, in which any
 “ one might acquire a property, but as public or common,
 “ in *this sense only*, that all might drink of it, or apply it
 “ to the necessary purposes of supporting life; and that
 “ no one had any property in the water itself, except in
 “ that particular portion which he might have abstracted
 “ from the stream, and of which he has the possession;
 “ and during the time of such possession only. We
 “ think that no other interpretation ought to be put
 “ upon the passage in Blackstone, and that the dicta of the
 “ learned judges above referred to, in which water is said
 “ to be *publici juris*, are not to be understood in any other
 “ than this sense; and it appears to us that there is no
 “ authority in our law, nor, as far as we know, in the
 “ Roman law (which, however, is no authority in ours),
 “ that the first occupant (though he may be the proprietor
 “ of the land above) has any right, by diverting the
 “ stream, to deprive the owner of the land below of the
 “ special benefit and advantage of the natural flow of the
 “ water therein.”

¹ 6 East, 208.² 1 B. & A. 258.³ 2 B. & C. 913.⁴ 1 Vent. 137.⁵ Commentaries, vol. ii. p. 14,
18.⁶ 2 Inst. tit. 1, s. 1; Dig., bk.
43, tit. 13.

“The right,” says Parke, B.,¹ “to have a stream flow in its natural state, without diminution or alteration, is an incident of property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor has the right to the usufruct of the stream which flows through his land.”

The right to the flow of running water, without diminution or alteration, being common to all those through whose land it flows, any unauthorized interference with or use of the water, to the prejudice of one entitled to its use, is the subject of an action for damage,² and may be restrained by injunction.

Obstruction of rights actionable.

This right, however, is not an absolute and exclusive right to the flow of *all* the water, but only subject to the right of other riparian owners to the reasonable enjoyment of it, and consequently it is only for an unreasonable and unauthorized use of this common benefit that an action will lie, though where there is an injury to a right, actual perceptible damage is not necessary to maintain it.³

The rights of riparian owners existing, as has been said, *ex jure naturæ*, and not depending on any presumed grant from the other riparian owners, are not limited by the present mode of enjoyment, and a new mode of enjoyment gives a right at once to sue for an injury done in respect of such new uses.⁴

Not limited by present enjoyment.

¹ *Embrey v. Owen*, 6 Ex. 353.
See 3 Kent's Comm., sect. 52,
p. 439; see also *Wright v. Howard*,
1 Sim. & S. 190.

Shugar, L. R., 6 Ch. 483.

³ *Embrey v. Owen*, 6 Ex. 353.
See also 3 Kent's Comm., sect. 52,
p. 430.

² See *Grand Junction Canal v.*

⁴ *Holker v. Porrit*, L. R., 10 Ex.

"All persons," says Cresswell, J., "having lands on the margin of a flowing stream, have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and they may begin to exercise them when they will."¹

Thus, in *Mason v. Hill*,² cited above, the proprietor of a mill having appropriated the water of a stream to the use of a mill newly erected, was held entitled to recover from a proprietor higher up the stream damages for the injury to his mill occasioned by the wrongful diversion of the stream, although before the mill was built the wrongdoer could only have been liable to nominal damages. "It is the necessary effect of every appropriation of running water to a new and more beneficial use, that a wrongful diversion or abstraction entails a larger measure of liability."³

Limited only
by rights of
persons in
similar posi-
tion.

It would seem that the rights of a riparian proprietor, with respect to a stream, are limited only by those of persons in a similar or analogous position with himself.⁴ Thus, where the same person is proprietor of the ground on both sides of a non-navigable stream, he can change the channel as he pleases, provided he restores it to the old channel before it leaves his ground, and provided that it flows out of his ground into the lands below as it was wont to do, neither increased nor diminished in quantity, quality, or direction.⁵ In the case of *Whaley v. Lang*,⁶ it was held that the mere possession or taking of water by a person not a riparian owner is not sufficient to enable the possessor to maintain an action for polluting it. In the

59; *Mason v. Hill*, 5 B. & A. 1; *Pennington v. Brinsop Hall Co.*, 1 Ch. Div. 769; *Chasemore v. Richards*, 7 H. L. 382; *A.-G. v. Birmingham*, 4 De G. & J. 528.

¹ *Sampson v. Hoddinot*, 1 C. B., N. S. 590.

² 5 B. & A. 1.

³ Per Lush, J., delivering judgment of the Exchequer Chamber

in *Holker v. Porrit*, L. R., 10 Ex. 59.

⁴ Per Channell, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 13.

⁵ Per Lord Blackburn, *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

⁶ 3 H. & N. 675; Ex. Ch., 2 H. & N. 476. See per Bramwell, B., in *Stockport v. Potter*, 3 H. & C. 300.

case of *The Stockport Waterworks Co. v. Potter*,¹ where the plaintiffs, a water company, who had by grant a right to take water from the Mersey, for supplying the inhabitants of Stockport with water, brought an action against defendants for polluting such water; it was held by Pollock, C. B., and Channel, B.,—Bramwell, B., *diss.*,—that the rights which a riparian owner has with respect to the water are entirely derived from his possession of land abutting on the stream, and that if by a deed which conveys only land not abutting on the stream he affects to grant water rights, such grant, though valid against the grantor, can create no rights for an interruption of which the grantee can sue a third party. In the subsequent case of *Nuttall v. Bracewell*,² this view is confirmed by the majority of the Court of Exchequer.

In certain exceptional cases there may exist an absolute right to the whole of the water of a stream, so as to entitle a man to sue for the diversion of any part of it.³ Thus, in *Holker v. Porrit*,⁴ where a natural stream had been divided immemorially, and one branch ran into a farm-yard where it supplied a trough, and the overflow from the trough was formerly diffused and discharged itself by percolation, and the owner connected the trough with reservoirs, and used the surplus water for a mill; it was held that his grantee could maintain an action against an upper riparian proprietor on the stream above the diversion for obstructing the flow of the water. Lush, J., delivering the judgment of the Court, said, “The water which came down to him at the farm was his own, to use it as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use he chose to make of it. In this respect his position was different from that of a riparian owner, who only shares the use of the water

Sole right to water.

¹ 3 H. & C. 300.

² L. R., 2 Ex. 1. See also *Crossley v. Lightowler*, L. R., 3 Ch. 478.

³ As by Act of Parliament. See p. 114.

⁴ L. R., 10 Ex. 59 (Ex. Ch.); L. R., 8 Ex. 107.

“with other riparian owners. In collecting the overflow at the trough and conveying it to the mill he clearly did nothing in derogation of the rights of any other person, or which he was not entitled to do in the lawful use and enjoyment of his own property; nor did he thereby lose any right which he then before had. While the water overflowed the trough and ran to waste, he had a right to complain of any undue diversion or obstruction of the stream which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill. No doubt the consequences to a wrongdoer became more serious after the drain was made than they were before, because the wrongful act was more injurious, and larger damages would have been paid for it; but it is a fallacy to say that a man’s rights are abridged, if, when he abuses them, he has to make larger compensation.”¹

Special statutory property in water.

In the case of *Medway Co. v. Earl of Romney*,² the plaintiffs were incorporated by Act of Parliament for the purpose of making the Medway navigable; and “the said river and streams so to be made navigable, and all lands, &c. to be used for the benefit of the navigation were vested in the company for ever.” The defendants constructed works on the river, and raised water from the river to supply a county lunatic asylum and gaol not on riparian lands. On action brought for this diversion, the Court held that the action would lie. Mr. Justice Willes says, delivering the judgment of the Court: “Looking to the objects which were contemplated by the Acts of Parliament, to which our attention has been directed, we cannot construe the statute 13 *Geo. II. c. 26, s. 2*, as giving the plaintiffs any such a limited right in the river as a private grant of the ‘said river and stream’ might have conveyed, but as creating a new species of statutory property and interest in the water, which, in our opinion, was interfered with by the abstraction of it for the purposes to which

¹ *Holker v. Porrit*, L. R., 10 Ex. 59; and see *Mason v. Hill*, 5 B. & A. 1; *Orr Ewing v. Colquhoun*, 2

App. Cas. 584.

² 9 C. B., N. S. 575. See *Rochdale Canal v. King*, 14 Q. B. 122.

“it was applied by the defendant; which purposes were more extensive than those for which a riparian proprietor, as such, could insist upon appropriating the stream as it passed by his land. In our view of the true construction of the Act of Parliament, it is not necessary that there should be an actual damage to the navigation; because we think that the legislature intended to give the company such an interest in all the water of the river for the purposes of the navigation as is interfered with by the abstraction of any part thereof. Whether or not the riparian proprietors can exercise, for the benefit of their land adjoining the river, the rights which ordinarily belong to such proprietors, it is unnecessary to express an opinion.”

It is proposed now to consider the natural rights of riparian owners to the flow of water through or past their lands, and the injuries which may be sustained by them by a wrongful interference with such flow so as to injuriously affect—1st. The natural *quantity* of the water,—as by diversion and obstruction; and 2ndly. The natural *quality* of the water,—as by pollution.¹

Natural right
to flow of
water.

The Right to Water in its Natural Quantity.

A riparian owner in a natural stream is entitled to have the water flow to him in its natural state, so far as that may be a benefit to him,—as, for instance, to turn his mill and water his cattle; and he is bound to submit to receive the water, so far as it is a nuisance by its tendency to flood his lands.² “By the general law applicable to running streams,” says Lord Kingsdown,³ “every riparian pro-

¹ The right of access which a riparian owner has on a navigable river, from his land to the river, for the purpose of exercising the public right of navigation, is treated of in Chapter II. p. 86.

² Per Blackburn, J., in *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 582.

³ *Miner v. Gilmour*, 12 Moo. P.

C. 131; *Swindon Water Co. v. Wilts Canal Co.*, L. R., 7 H. L. 697; L. R., 9 Ch. 451; *Embrey v. Owen*, 6 Ex. 353; *Chasemore v. Richards*, 7 H. L. 349; *Sampson v. Hoddinot*, 1 C. B., N. S. 590; *Mason v. Hill*, 5 B. & A. 1; *Wright v. Howard*, S. & S. 190; *Earl of Norbury v. Kitchin*, 3 F. & F. 292; 9 Jur., N. S. 132.

Ordinary use. "prietor has a right to what may be called the ordinary use of the water flowing past his land,—for instance, to the reasonable use of the water for his domestic purposes and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream."

Domestic purposes.

With regard to what is meant by "domestic purposes," Lord Romilly, M. R., says, in *A.-G. v. Great Eastern Railway*,¹ that the term "unquestionably would extend to culinary purposes; to the purposes of cleansing and washing, feeding and supplying the ordinary quantity of cattle, and so on;" but he held that a railway company, as riparian owners, were not entitled to take water for the purpose of watering their engines so as to injuriously affect the navigation of a stream, such use not being a "domestic use," and, moreover, that the fact that the railway company did not require the water for domestic uses did not entitle them to take it for other purposes of a different character.² The washing of carriages has been held to be a domestic use under a local Act of Parliament regulating a water company.³ "Brewing" would also appear to be a domestic use.⁴

Extraordinary use—mills, irrigation;

"But every riparian proprietor has also a further right to the use of the water for any purpose, or what may be deemed the *extraordinary* use of it, provided he does not interfere thereby with the rights of other proprietors either above or below. Subject to this condition he may dam it up for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."⁵

¹ 23 L. T., N. S. 344.

² See *Earl of Sandwich v. Great Northern Railway*, 10 Ch. D. 707, and *post*, p. 119.

³ *Busby v. Chesterfield Water Co.*, E. B. & E. 176.

⁴ Per James, L. J., in *Wilts & Berks Canal v. Swindon Water Co.*, L. R., 9 Ch. 457.

⁵ *Miner v. Gilmour*, 12 Moore, P. C. C. 131. See also *Chasemore v. Richards*, 7 H. L. 349; *Embrey v. Owen*, 6 Ex. 353; 3 Kent's Comm. Sect. 52, pp. 439—445, cited in *Embrey v. Owen*, *sup.*, at p. 369; and *Tyler v. Wilkinson*, 4 Mason's U. S. Rep. 400, per Story, J.

Such "extraordinary use," in order to be justifiable, however, must be a reasonable use, and one for which a riparian proprietor is entitled to take the water from its natural course;¹ for where an unreasonable use is made of the water by one riparian proprietor, the others are entitled to have it restrained, even though they prove no actual damage, on the ground that it is an interference with a right which unless restrained would in the course of twenty years confer on the claimant a right by prescription in derogation of the prior right.² The law on this point is very clearly stated by Cairns, L. C., in the case of *The Swindon Water Co. v. Wilts and Berks Canal*.³ In this case the directors of a waterworks company purchased a mill on the upper part of a stream, and so became riparian owners. They not only used the water for the purposes and in the manner allowed by the law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, and claimed, as their legal right, such user of it. The House of Lords held that the use of the water was not a reasonable use such as could justifiably be made by an upper riparian owner, and that a canal company, who were riparian owners below, were entitled to an injunction to restrain this use of the water. "Undoubtedly," says Lord Cairns, "the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use it; that is quite consistent with the right of the upper owners also to use the water for all ordinary purposes, viz. as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by means of that use. But further, there are uses, no doubt, to which the water may be put by the

*Swindon
Water Co. v.
Wilts and
Berks Canal,*

¹ Per James, L. J., in *Wilts and Berks Canal v. Swindon Water Co.*, L. R., 9 Ch. 457.

² L. R., 7 H. L. 697.

³ *Swindon Water Co. v. Wilts Canal*, L. R., 7 H. L. 697; *Grand*

Junction Canal v. Shugar, L. R., 6 Ch. 577; *Embrey v. Owen*, 6 Ex. 353, per Parke, B.; *Elwell v. Crowther*, 31 Beav. 163; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Rochdale Canal v. King*, 2 Sim., N. S. 79.

and connected with tenement of the upper owner.

“ upper owner, *e.g. uses connected with the tenement* of that
 “ upper owner. Under certain circumstances, and provided no material injury is done, the water may be used
 “ and may be diverted for a time by the upper owner for
 “ the purpose of irrigation. This may well be done, and
 “ the exhaustion of the water which may thereby take
 “ place may be so inconsiderable as not to form a subject
 “ of complaint by the lower owner; and the water may be
 “ restored, after the object of irrigation is answered, in a
 “ volume substantially equal to that in which it passed
 “ before. Again, it may well be, that there may be a use of
 “ the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint
 “ can be made on the subject by the lower owner.
 “ Whether such a use in any particular case could be made
 “ for manufacturing purposes, connected with the upper
 “ tenement, would, I apprehend, depend upon whether the
 “ use was a reasonable use. Whether it was a reasonable
 “ use would depend, at all events, in some degree, on the
 “ magnitude of the stream from which the deduction was
 “ made for this purpose over and above the ordinary use of
 “ the water. But my lords and your lordships will find
 “ that in the present case you have no difficulty in saying
 “ whether the use which has been made of the water by
 “ the upper owner comes under the range of these authorities, which deal with cases such as I have supposed,—
 “ cases of irrigation and cases of manufacture. Those
 “ were cases where the use made of the stream by the
 “ upper owner has been for purposes connected with the
 “ tenement of the upper owner. But the use which here
 “ has been made by the appellants, and the use which they
 “ claim the right to make of it, is not for the purpose of
 “ their tenements at all, but is a use which virtually
 “ amounts to a complete diversion of the stream—as great
 “ a diversion as if they had changed the watershed of the
 “ country, and in place of allowing a stream to flow towards
 “ the south, had altered it near its source so as to make it

“flow towards the north. My lords, that is not a user of the stream that could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and is done not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties who have no connection with any part of the stream. It is a matter quite immaterial whether, as riparian owner of Wayte’s tenement, any injury has now been sustained, or has not been sustained, by the respondents. If the appellants are right, they would at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property—the riparian right of Wayte’s tenement. That is a consequence which the owner of Wayte’s tenement has a right to come into the Court of Chancery to get restrained at once by injunction or declaration, as the case may be.”

An unreasonable use amounts to a confiscation of the rights of a lower owner.

From this case it would seem that an “extraordinary use,” as well as being reasonable, must be for the use of the riparian tenement.¹ This point does not appear to have been pressed in the case of *Earl of Norbury v. Kitchin*,² where it was held that a riparian owner had a right by means of water-wheels and machinery to pump water from a stream flowing past his land to a reservoir, and to convey it thence to his dwelling-house on another estate, and there to apply it to his domestic use and other purposes of utility, provided he took only a reasonable quantity with reference to the size of the stream—but that he had no right to take by means of machinery more water than he would have a right to otherwise.

In *Earl of Sandwich v. Great Northern Rail. Co.*,³ Bacon, V.-C., held that a railway company, as riparian owners,

¹ As to this see *Nuttall v. Bracewell*, L. R., 2 Ex. 1; *Stockport Water Co. v. Potter*, 3 H. & C. 300, and ante, p. 112.

² 3 F. & F. 292; 9 Jur., N. S. 132.

³ 10 Ch. Div. 707.

were entitled to take a reasonable quantity of water for supplying their engines, and for the several purposes of their station, returning what they did not want to the stream, and dismissed a bill by a mill-owner lower down the stream, who failed to prove any damage to his mill by the abstraction.

A riparian owner is therefore at liberty to pen back and divert temporarily the waters of a stream flowing through his lands in a reasonable way, and for reasonable purposes connected with his tenement, provided he does not thereby injure his neighbours, and no action will lie for such obstruction unless the complainant can prove actual damage.¹ Where, however, the purpose for which the water is taken is not reasonable, or not a use connected with the riparian tenement, the taking it is an invasion of a right of property; and whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the violation of the right, and the law will presume damage.²

Irrigation.

Whether a riparian proprietor may use the water of a stream for the purposes of irrigation, if he again return it to the stream with no other diminution than that caused by the evaporation and absorption attendant on irrigation, appears to depend on the circumstances of each particular case. Thus in *Embrey v. Owen*,³ where it was proved that the diversion was not continuous, and that it caused no diminution cognizant to the senses, the Court held that this was not under the circumstances such an unreasonable use as to be prohibited by law. Where the defendant diverted water from a river for the purposes of irrigation, and the amount of water was not thereby diminished, but the water arrived so late at the plaintiff's land below that he could not use it fully for irrigation purposes, it was held that this detention of the water by the defendant was

¹ *Williams v. Morland*, 2 B. & C. 910; *Mason v. Hill*, 5 B. & A. 1.

² *Embrey v. Owen*, 6 Ex. 353, per Parke, B., at p. 363; *Swindon*

Water Co. v. Wilts and Berks Canal, L. R., 7 H. L. 697.

³ 6 Ex. 353.

a use of it which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian owner, and therefore a ground of action.¹

The owner of a mill on the banks of a running stream Mills. may, as has been stated, divert and use the water for the purposes of his mill, provided he does not thereby interfere with the rights of other riparian owners above or below him. He cannot, however, unless he has gained a prescriptive right to do so, interfere, by his user of the water, with the rights of other riparian owners.²

“The owner on the banks of a non-navigable river,” says Lord Blackburn,³ “has an interest in having the “water above him flow down to him, and in having the “water below him flow away from him as it has been “wont to do, yet I apprehend that a proprietor may, “without any illegality, build a mill-dam across the “stream within his own property, and divert the water “into a mill lade without asking leave of the proprietors “above him; provided he builds it at a place so much “below the lands of those proprietors as not to obstruct “the water from flowing away as freely as it was wont, “and without asking leave of the proprietors below him, “if he takes care to restore the water to its natural course “before it enters their land.”

So where a riparian owner has so appropriated in a reasonable manner the water of a stream to a beneficial use, he may at once maintain an action for any infringement of this new use by other riparian owners, above or below him. He cannot, however, unless he has gained a prescriptive right so to do, interfere by his user of the water with the rights of other riparian owners.

The occupier of a mill may maintain an action for infringing his water-right, though he has not enjoyed it for twenty years in precisely the same state; and it is no

¹ *Sampson v. Hoddinot*, 1 C. B., *post*, Ch. IV.
N. S. 590.

² See per Martin, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 1. See *Orr Ewing v. Colquhoun*, 2 App. Cas. 856; cf. *Miner v. Gilmour*, 12 Moore, P. C. C. 131.

defence that the occupier had within a few years erected on his mill a wheel of different dimensions, but requiring less water. Bayley, J., said—"The plaintiff proved that he was possessed of a mill, that the water had flowed from time immemorial in a particular channel, and that the defendant had obstructed it. If a person stop a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action."¹

Plea of diversion, how supported.

In an action for diverting a stream, it was alleged that defendant placed a dam across the stream, and thereby diverted the water from its usual course. Held, that such allegation was supported by proof that in consequence of the dam the water was prevented from being regularly supplied to the mill, though the stream was not diverted and returned to its course before it reached the mill, and there was no waste of water.² But a count for diverting and turning a stream is not supported by proof of penning back and checking it, whereby water was made to overflow plaintiff's land.³

Diversion of natural stream by artificial means.

A riparian owner on a natural stream, who has, without infringing the rights of the other riparian owners, diverted for the purposes of his mill a portion of the water by means of an artificial conduit or goit, does not from the fact that the goit is artificial lose his natural rights with regard to the water so supplied, but may maintain an action for diversion or pollution of the stream, whereby his rights with regard to the water in the goit are infringed. Where the conduit or goit is on the land of the mill-owner himself, there seems to be no doubt that the law is as above stated;⁴ but where the artificial channel has been constructed by license across the land of another,

¹ *Saunders v. Newman*, 1 B. & Ald. 258; *Cox v. Mathews*, 1 Vent. 137.

² *Shears v. Wood*, 7 Moore, 345. See *Sampson v. Hoddinot*, 1 C. B., N. S. 690.

³ *Griffiths v. Mann*, 6 Price, 1.

⁴ See per Lord Campbell, C. J., in *Beeston v. Weate*, 5 E. & B. 986; and per Kelly, C. B., in *Holker v. Porrit*, L. R., 8 Ex. 114.

some difference of opinion has arisen as to whether a riparian owner has sufficient interest in such artificial channel to enable him to maintain an action for an interference with the water therein.

It has been decided in the case of *The Stockport Water Co. v. Potter*,¹ by the majority of the Court of Exchequer—Bramwell, B., *dissentiente*—that if a riparian owner grants to a non-riparian owner lands not abutting on the stream, this grant, though valid as against the grantor, can create no right for an interruption of which the grantee can sue a third party; and that, therefore, the Stockport Water Company, who had bought from a riparian owner certain waterworks not on riparian lands, and also the use of certain tunnels and conduits running through the riparian lands from a natural stream to the waterworks, could not sue a higher riparian owner for polluting the stream.² Bramwell, B., dissented from this view of the law, and held that the grantees could recover, on the general principle that where a man has property he may grant to others estates in and enjoyment of it.

In *Nuttall v. Bracewell*,³ the plaintiff owned a mill situate on riparian lands, which was supplied with water by an open goit, made in 1804 by agreement in writing with the adjoining higher riparian owner, Mr. Bagshaw, diverting water from the stream on which the mill was situate, by means of a weir at a point called Tom Milner's Ing on that upper owner's land. The water was again returned to the stream below the mill. The action was brought by the plaintiff against a higher riparian owner for diverting water from the stream above the weir. A verdict was given for the plaintiff; but a rule was obtained

*Nuttall v.
Bracewell.*

¹ 3 H. & C. 300. See *Whaley v. Laing*, 3 H. & N. 675, 901; 27 L. J., Ex. 422.

² The water in this case was diverted for the purpose of supplying the town of Stockport with water, which was an unreasonable use for a riparian owner to make

of it; and, therefore, it would appear that no action would have lain for an interference with it, by the grantor himself, or by the grantee in his name. See *Swindon Waterworks v. Wilts and Berks Canal*, L. R., 7 H. L. 697.

³ L. R., 2 Ex. 1.

for a new trial, on the ground that the plaintiff was a mere licensee, and not a riparian owner, and could not, therefore, on the authority of *Stockport Waterworks v. Potter*, recover for the diversion. The Court gave judgment for the plaintiff, and discharged the rule.

Martin, B., says: "The application and use of flowing water to work machinery is as old as the law. Corn mills have existed from time immemorial, and it appears from old legal authorities that fulling and other mills worked by water for the purpose of manufacture are of a very ancient date. Until the last century, steam as a power was, if known, not much in use; and until it was introduced, water power was very generally used; and it is still the cheapest one available. The mill is sometimes situated upon the bank of the natural stream, but more usually at some little distance from it; the water is conveyed to it by a goit or artificial cut, leading from the stream, and then, after turning the wheel of the mill, flows away in what is commonly called the tail goit. So also, water was and is very frequently conveyed from the natural stream in the same manner, for purposes of irrigation. And it is not too much to say, that the value of actual or supposed water rights of this character throughout England may be estimated by hundreds of thousands, if not millions." His Lordship then cites Lord Kingsdown's exposition of the law relating to riparian rights, in *Miner v. Gilmour*,¹ and continues: "According to the law so enunciated, and which no doubt is the law, it would be competent for Mr. Bagshaw, or his successor in the ownership of Tom Milner's Ing, to erect a mill upon it, and take the water from the stream to work it, provided he neither penned back the water upon his neighbour above, nor injuriously affected the volume and flow of the water of the stream to his neighbour below. And the law favours the exercise of such a right; it is at once beneficial to the owner and to the

¹ 12 Moo. P. C. 156. See *ante*, p. 116.

“commonwealth. And if this be so, why may not the owners of two adjoining closes agree together for their mutual benefit to take water through a goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter, and thereby doing no injury to any one. In point of fact, very many goits pass through the land of different land-owners, between the place where the water is taken from the stream and the mill where it works the machinery.” The learned Baron went on to say, that as the right to the flow of water in a goit was a well-known easement,¹ he was of opinion that although such an easement could be only binding as against the grantor if by deed, that the actual possession of the goit by the plaintiff gave him a right of action against defendant, a wrongdoer.

Pollock, C. B., and Channell, B., arrived at the same conclusion, but upon different grounds, holding that the diversion of the stream by means of the goit was lawful, and amounted to a division of the stream into two channels; and that the plaintiff, as a riparian owner on the goit, had all the rights which a riparian owner would have had on a natural stream. “The *Stockport case*,” says Channell, B., delivering the joint judgment of the Lord Chief Baron and himself, “in effect decided that a riparian proprietor cannot grant away his water rights apart from his estate, so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself. . . . If, however, two adjoining riparian proprietors agree to divert the stream so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is, I think, different. What is done is apparent to all, and any use that may be made of the new stream, as to

¹ As to this see *post*, Ch. IV.; and per Cockburn, C. J., in *Mason v. Shrewsbury*, L. R., 6 Q. B. 586; and per Lord Campbell, C. J., in *Beeston v. Wate*, 5 E. & B. 986.

“turn a mill for instance, is as apparent as if the mill
 “were upon the old stream. What is done by the two
 “proprietors may be supposed to be a more convenient
 “way of using the flow of the water, while it in no way
 “diminishes or affects the rights of the other proprietors.”
 This distinction is alluded to in the judgment of the
 majority in *Stockport Waterworks v. Potter*, where it is
 said: “The case where a riparian proprietor makes two
 “streams instead of one, and grants land on the new
 “stream, seems analogous to a grant of a portion of the
 “river bank, but not analogous to a grant of a portion of
 “the riparian estate not abutting on the river. In the
 “case of a grant of land on a new stream, the grantee
 “obtains a right of access to the river, and it is by virtue
 “of that right of access that he obtains his water rights.”

Bramwell, B., also gave judgment for the plaintiffs on
 the same ground as in the *Stockport case*.

*Crossley v.
 Lightowler.*

In *Crossley v. Lightowler* the plaintiffs, owners of mills
 on the river Hebble, by agreement with a higher riparian
 owner named Pilling, laid down a pipe in that higher
 riparian owner's land, for the purpose of obtaining a
 supply of pure water from the river above Pilling's dye
 works. A suit was brought to restrain the defendant, a
 higher riparian owner, from polluting the river to the
 plaintiff's injury, and an injunction granted by Wood,
 V.-C.;¹ but on appeal so much of the decree as related to
 fouling of the water received through the pipe on Pilling's
 land was reversed by Lord Chelmsford, L. C.² “From
 “what has been already said,” says the learned lord, “it
 “may be collected that, in my opinion, if the plaintiffs
 “had proved the pollution of the Hebble opposite to their
 “mills by the defendants, they would have had good
 “ground for an injunction, although they were not
 “actually using the water for their business. But,
 “although the plaintiffs by their bill assert their rights
 “as riparian proprietors, the case which they prove is of

¹ L. R., 3 Eq. 279.

² L. R., 3 Ch. 478.

“an entirely different description. Whether the agreement with Messrs. Pilling, however binding upon them, would enable the plaintiffs to assert the right acquired under it in their own names against any person fouling the waters thus artificially obtained is, perhaps, doubtful: but the plaintiffs do not claim as the grantees of Pilling, but in their character as riparian proprietors, and the fouling which they prove is not of the water which flows between the banks at Dean Clough (*i. e.* past plaintiffs’ mill), but of the supply, which they draw to the mills from a higher source. This is clearly not an injury to the rights of the plaintiffs as riparian owners.”

It is remarkable that the Lord Chancellor in his judgment does not refer to the case of *Nuttall v. Bracewell*, which was cited in argument, and which is only distinguishable in the fact that the goit in that case was open and apparent to all, whereas in the case of *Crossley v. Lightowler* the water was conveyed by a covered drain. Lord Chelmsford, however, does not rest his decision on this point, and the cases must be taken as undoubtedly conflicting. The preponderance of authority would certainly seem in favour of the view of the Court in *Nuttall v. Bracewell* and *The Stockport Waterworks v. Potter*.¹

A riparian owner is not only entitled to have the waters of a stream passing through his lands flow to him in its natural state so far as it is a benefit to him, but he is also bound to submit to receive it so far as it is a nuisance to him by its tendency to flood his lands.² Unless, therefore, the flow of the stream is increased or diverted to his prejudice by some unauthorized act, either of the proprietors above or below him, he has no remedy, but must submit to what is the result of natural causes.

Liability to receive flood water.

Thus where a stream becomes by natural causes silted up or choked with reeds, and in consequence overflows adjoin-

¹ See *Holker v. Porrit*, L. R., 3 Ex. 107; *Beeston v. Weate*, per Lord Campbell, C. J., 5 E. & B. 986; *Magor v. Chadwick*, 11 A. & E. 571; *Sutcliffe v. Booth*, 9 Jur., N. S.

1037; *Wood v. Waud*, 3 Ex. 748.

² Per Blackburn, J., in *Mason v. Shrewsbury Rail. Co.*, L. R., 6 Q. B. 582. See also *Wilson v. Waddell*, 2 App. Cas. 95.

ing land, there is no common law liability on the owner to clear the channel or to compensate the adjoining land-owners who may be damaged thereby.¹

Liability for
escape and
overflow of
water.

The principles of law regulating the duties and liabilities of the owners of land with regard to the escape and overflow of water, and the rights they have of protecting their land from such overflow, have been discussed of late in a series of important cases, and seem now to be settled on a satisfactory basis. The general principle regulating the liabilities of landowners, with regard to the escape and overflow of water, seems to be as follows:—Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use,² though mischief thereby accrues to his neighbour, he will not be liable for damages; but where for his own convenience he diverts or interferes with the course of a stream, or where he brings upon his land water which would not naturally have come upon it, even though in so doing he act without wilfulness or negligence, he will be liable for all direct and proximate damages,³ unless he can show that the escape of the water was caused by an agent beyond his control, or by a storm, which amounts to *vis major* or the act of God, in the sense that it is practically, if not physically, impossible to resist it.⁴ His liability, moreover, in no way depends on his knowledge of the existence of the nuisance.⁵

¹ *Hodgson v. Mayor of York*, 28 L. T., N. S. 836. See also *Cracknell v. Thetford*, L. R., 4 C. P. 629; *Parrett Navigation Co. v. Robins*, 10 M. & W. 593; *Bridge's case*, 10 Rep. 33.

² With regard to natural streams, it is the undoubted right of the owner of the banks and bed to build on the bed or banks in the same way as he may on any part of his land not covered with water; provided that he does not interfere with either the rights of navigation or of the other riparian owners above or below him; he cannot, however, obstruct the course of a stream by building on the ordinary or flood

channel, so as to throw the waters in the times of ordinary flood on the grounds of another proprietor to his injury. *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Menzies v. Breadalbane*, 3 Bli., N. S. 414. See *ante*, Ch. II. p. 73 *et seq.*

³ *Cattle v. Stockton Water Co.*, L. R., 10 Q. B. 453.

⁴ *Rylands v. Fletcher*, L. R., 3 H. L. 330; L. R., 1 Ex. 265; *Fletcher v. Smith*, 2 App. C. 781; *Box v. Jubb*, 4 Ex. D. 76; *Nicolls v. Marsland*, L. R., 10 Ex. 255; *Boughton v. Mid. & G. W. Rail. Co.*, L. R., 7 C. L. 169.

⁵ See *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; *Hipkins v. Birmingham Gas Co.*, 6 H. & N. 250.

The principles of law above stated have been held to apply equally to water upon the surface and underground, and in fact most of the most important decisions have arisen with regard to the effects of mining operations. A series of cases have of late fully settled the law on this most important subject.

The same as to surface and underground water.

These principles are established in a series of cases, of which *Rylands v. Fletcher*¹ is the first. The facts of the case and the principles of law are thus stated by Lord Cairns, L. C. : "The plaintiff is the occupier of a mine and works "under a close of land. The defendants are the owners of "a mill in his neighbourhood, and they proposed to make "a reservoir for the purposes of keeping and storing water "to be used about their mill upon another close of land, "which for the purposes of this case may be taken as "being adjoining to the close of the plaintiff, although "in point of fact some intervening land lay between the "two. Underneath the close of land of the defendants, "on which they proposed to construct their reservoir, "there were certain old and disused mining passages and "works. There were five vertical shafts, and some "horizontal shafts communicating with them. The "vertical shafts had been filled up with soil and rubbish, "and it does not appear that any person was aware of the "existence of either of the vertical shafts or of the "horizontal works communicating with them. In the "course of the working by the plaintiff of his mine, he "had gradually worked through the seams of coal under- "neath the close, and had come into contact with the old "and disused works underneath the close of the defen- "dants. In that state of things, the reservoir of the "defendants was constructed. It was constructed by them "through the agency and inspection of an engineer and "contractor. Personally, the defendants appear to have "taken no part in the works, or to have been aware of

Rylands v. Fletcher.

¹ L. R., 3 H. L. 330.

“ any want of security connected with them. As regards
“ the engineer and the contractor, we must take it from
“ the case that they did not exercise, as far as they were
“ concerned, that reasonable care and precaution which
“ they might have exercised, taking notice, as they appear
“ to have taken notice, of the vertical shafts filled up in
“ the manner which I have mentioned. However, my
“ lords, when the reservoir was constructed and filled, or
“ partly filled with water, the weight of the water bearing
“ upon the disused and imperfectly filled up vertical
“ shafts, broke through those shafts. The water passed
“ down them and into the horizontal workings, and from
“ the horizontal workings under the close of the defen-
“ dants it passed on into the workings under the close of
“ the plaintiff and flooded his mine, causing considerable
“ damage, for which this action was brought. The Court
“ of Exchequer, when the special case stating the facts to
“ which I have referred was argued, was of opinion that
“ the plaintiff had established no cause of action. The
“ Court of Exchequer Chamber, before which an appeal
“ from this judgment was argued, was of a contrary
“ opinion; and the judges there unanimously arrived at
“ the conclusion that there was a cause of action, and that
“ the plaintiff was entitled to damages. My lords, the
“ principles on which the case must be determined appear
“ to me to be extremely simple. The defendants, treating
“ them as the owners or occupiers of the close on which
“ the reservoir was constructed, might lawfully have used
“ that close for any purpose for which it might, in the
“ ordinary course of the enjoyment of land, be used; and
“ if, in what I may term the natural user of that land,
“ there had been any accumulation of water, either on the
“ surface or underground, and if, by the operation of the
“ laws of nature, that accumulation of water had passed
“ off into the close occupied by the plaintiff, the plaintiff
“ could not have complained that that result had taken
“ place. If he had desired to guard himself against it, it

“ would have lain upon him to have done so, by leaving,
 “ or by interposing, some barrier, between his close and
 “ the close of the defendants, in order to have prevented
 “ that operation of the laws of nature.

“ As an illustration of that principle, I may refer to a
 “ case which was cited in the argument before your
 “ lordships, the case of *Smith v. Kenrick*,¹ in the Court of
 “ Common Pleas. On the other hand, if the defendants,
 “ not stopping at the natural use of the close, had desired
 “ to use it for any purpose, which I may term a non-
 “ natural use, for the purpose of introducing into the close
 “ that which in its natural condition was not in or upon it,
 “ for the purposes of introducing water, either above or
 “ below ground, in quantities and in a manner not the
 “ result of any work or operation on or under the land;
 “ and if, in consequence of their doing so, or in consequence
 “ of any imperfection in the mode of their doing so, the
 “ water came to escape and to pass off into the close of the
 “ plaintiff, then it appears to me that that which the de-
 “ fendants were doing they were doing at their own peril;
 “ and if, in the course of their doing it, the evil arose to
 “ which I have referred, the evil, namely, of the escape of
 “ the water and its passing away to the close of the plain-
 “ tiff and injuring the plaintiff, then for the consequence
 “ of that, in my opinion, the defendants would be liable.
 “ As the case of *Smith v. Kenrick* is an illustration of the
 “ first principle to which I have referred, so also the second
 “ principle to which I have referred is well illustrated by
 “ another case in the same Court—the case of *Baird v. Wil-*
 “ *liamson*,² which was also cited in the argument at the
 “ bar. My lords, these simple principles, if they are well
 “ founded, as it appears to me they are, really dispose of
 “ this case. The same result is arrived at on the principles
 “ referred to by Mr. Justice Blackburn in his judgment in
 “ the Court of Exchequer Chamber, where he states the
 “ opinion of that Court as to the law in these words:—‘We

¹ 7 C. B. 515.

² 15 C. B., N. S. 376.

“ ‘think that the true rule of law is, that the person who,
 “ ‘for his own purposes, brings on his land, and collects
 “ ‘and keeps there anything likely to do mischief if it
 “ ‘escapes, must keep it at his peril ; and if he does not do
 “ ‘so, is *primâ facie* answerable for all the damage which is
 “ ‘the natural consequence of its escape.¹ He can excuse
 “ ‘himself by showing that the escape was owing to the
 “ ‘plaintiff’s default ; or, perhaps, that the escape was the
 “ ‘consequence of *vis major*, or the act of God ; but as
 “ ‘nothing of this sort exists here, it is unnecessary to
 “ ‘inquire what excuse would be sufficient. The general
 “ ‘rule, as above stated, seems, on principle, just. The
 “ ‘person whose grass or corn is eaten down by the escaping
 “ ‘cattle of his neighbour, or whose mine is flooded by the
 “ ‘water from his neighbour’s reservoir, or whose cellar is
 “ ‘invaded by the filth from his neighbour’s privy, or whose
 “ ‘habitation is made unhealthy by the fumes and noisome
 “ ‘vapours of his neighbour’s alkali works, is damnified
 “ ‘without any fault of his own ; and it seems but reason-
 “ ‘able and just that the neighbour who has brought some-
 “ ‘thing on his own property (which was not naturally
 “ ‘there), harmless to others so long as it is confined to his
 “ ‘own property, but which he knows will be mischievous
 “ ‘if it gets on his neighbours, should be obliged to make
 “ ‘good the damage which ensues if he does not succeed in
 “ ‘confining it to his own property. But for his act in
 “ ‘bringing it there no mischief could have accrued, and
 “ ‘it seems but just that he should, at his peril, keep it
 “ ‘there, so that no mischief may accrue, or answer for the
 “ ‘natural and anticipated consequence. And upon autho-
 “ ‘rity this, we think, is established to be the law, whether
 “ ‘the things so brought be beasts, or water, or filth, or
 “ ‘stenches.’ My lords, in that opinion, I must say, I en-
 “ ‘tirely concur. Therefore I move your lordships that the
 “ ‘judgment of the Court of Exchequer Chamber be affirmed,
 “ ‘and the present appeal be dismissed with costs.”

¹ As to this see *Jones v. Ffestiniog Rail. Co.*, L. R., 3 Q. B. 733.

Following this decision, the Court of Appeal have held that, if anyone, by artificially raising the surface of his own land, causes water, even though arising from natural rainfall, to pass to his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is injured. This liability is limited to liability for allowing things, in themselves offensive, to pass to a neighbour's property, and for causing, by artificial means, things, in themselves in-offensive, to pass to a neighbour's property, to the prejudice of his enjoyment thereof.¹

Liability for bringing rain-water on the lands of another by means of artificial erection.

So, where water and sewage came on the defendant's land by an artificial drain made for the convenience of the defendant, and, passing thence, flooded the plaintiff's adjoining premises, it was held that the defendant was liable, although unaware of the existence of the drain, and consequently of its want of repair.² It has also been held that the occupier of a house is liable to the continuance of such a nuisance as the penetration of damp from an artificial mound on which his stable stood, though it had been put there before he took possession.³ Such liability does not exist between persons occupying two floors of the same house, and the upper occupier is not responsible to the lower, in the absence of negligence, for an escape of water from his water-closet, whereby the lower occupier is injured.⁴

Sewage.

So the discharging of rain-water from the roof of a house, either by means of a spout, or by drip, on the

Drip.

¹ See *Herdman v. N. E. Rail. Co.*, 3 C. P. D. 168 (C.A.); *Fitzsimmons v. Inglis*, 5 Taunt. 534. This is not at variance with *Wilson v. Waddell* (2 App. C. 95, post, p. 134), as there the excavation of minerals is a natural use of the land. (Here, *semble*, raising the surface is not a natural use.) Cf. *Menzies v. Bredalbane*, 31 Bli., N. S. 414 (H. L.).

² *Humphries v. Cousins*, 2 C. P.

D. 239; *Fletcher v. Rylands*, L. R., 3 H. L. 330.

³ *Broder v. Saillard*, 2 Ch. Div. 692, M. R.; see also *Hodgkinson v. Ennor*, 4 B. & S. 229; *Bell v. Twentyman*, 1 Q. B. 766; *Tenant v. Goldwin*, 2 Lord Raymond, 1089.

⁴ *Ross v. Fedden*, L. R., 7 Q. B. 661; *Carstairs v. Taylor*, L. R., 6 Ex. 217.

premises of a neighbour, is a nuisance, and actionable, in the absence of a prescriptive right to such discharge.¹

Liability only extends to proximate and direct consequences.

In the case of *Cattle v. Stockton Waterworks*,² it was decided that the liability for the escape of water only extends to the proximate and direct consequences of the escape, and that where a landowner had employed a contractor to excavate a tunnel on his land, and the works were stopped by the overflow of water from the defendant's pipes, even assuming that the landowner could recover, which point the Court did not decide, the contractor had no right of action for any loss which he might have sustained through being delayed in, or prevented from, completing his contract.

Right to work mines if duly exercised begets no responsibility.

In *Wilson v. Waddell*,³ the pursuer and defender were lessees of coal mines under one landlord. The seam of coal lay at a high inclination, and cropped out at the surface in defender's holding. The seam of coal entered the pursuer's holding at many fathoms below the surface, so that any water which fell on and percolated into the defender's holding would necessarily, by force and gravitation, descend to the pursuer's holding, unless stopped by the minerals or soil from doing so. The surface soil above the coal was an impervious clay, so that, while it was undisturbed, it held the water, and very little filtered down into the seam. Under these circumstances, the House of Lords held that, as the right to work mines is a right of property, which, if duly exercised, begets no responsibility, and that the defender having worked out all his coal, and so caused a subsidence of the surface, and a flow of rainfall into the pursuer's lower coal field, was not liable for any damage thereby caused, the injuries being entirely owing to gravitation and percolation.

¹ *Tucker v. Newman*, 11 A. & E. 40; *Fay v. Prentice*, 14 L. J., C. P. 298; *Rolfe v. Rolfe*, cited in *Beswick v. Combdon*, Moo. 353; 5 Rep. 101.

² L. R., 10 Q. B. 453; see *Lumly v. Gye*, 2 E. & B. 252; 22 L. J., Q. B. 479; *Langridge v. Leys*, 2 M. & W. 519; 4 M. & W. 337.

³ 2 App. Cas. 95.

In *West Cumberland Iron Co. v. Kenyon*, the defendants, owners of mining property, sunk a shaft, by which they tapped water which had formerly found its way into certain old workings on their own ground, and had thence percolated into plaintiffs' mines. The defendants then made a borehole at the bottom of the shaft. It was admitted that the making of it was not in the due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to let off the water into the above-mentioned old workings on defendants' ground, whence it percolated into plaintiffs' works in the same way in which it would have done if neither the shaft nor borehole had ever been made. The Court of Appeal¹ held, reversing the decision of Fry, J.,² that the defendants had not, by making the shaft, so appropriated the water, as to lay themselves under an obligation to keep it from coming to plaintiffs' land; and that, as the effect of defendants' operations was not to throw upon plaintiffs' land any burden which it had not borne before, the plaintiffs' case failed. So in *Smith v. Kenrick*, where the owner of a coal mine on a higher level worked out the whole of his coal in the ordinary way, leaving no barrier between his mine and the mine on the lower level, so that the water percolating into the upper mine flowed into the lower mine and obstructed the owner in getting his coal, it was held that the owner of the lower mine had no ground of complaint.³

But where the owner of an upper mine did not merely suffer the water to flow through his mine, but pumped up quantities of water which passed into plaintiff's mine, in addition to that which would have naturally reached it, and so occasioned him damage, it was held that, though this was done without negligence, and in the due working of the defendant's mine, yet he was responsible for damage so occasioned.⁴ Thus, too, in the case of *Crompton*

Liability for throwing on a mine water which would not naturally have come there.

¹ 11 Ch. D. 782.

² 6 Ch. D. 773.

³ 7 C. B. 564.

⁴ *Baird v. Williamson*, 15 C. B.,

ton v. Lea,¹ an injunction was granted to restrain the owner of a mine on a higher level from working his mines so near a river flowing over it, as to cause the waters of that river to flow into plaintiff's mine on a lower level; Hall, V.-C., in the course of his judgment, remarking, "I do not see why a mine owner who is lower down should be in a worse position, or less entitled to complain of an injury occurring to him from such an act, such as throwing down of the water upon him, than a riparian proprietor, or one who is not immediately a riparian proprietor, or one considerably inland. If any injury should accrue in consequence of the interference with the flow of a river in that way, I do not see why any person who sustains an injury in consequence of that which must be a wrong to somebody, is in a worse position than other persons who would have an undoubted remedy."

Liability for escape of water where an artificial is substituted for a natural channel.

Exceptional rainfall.

This case was followed by *Fletcher v. Smith*.² In this case the defendants' mine was on a higher level than the plaintiff's, and on the surface of defendants' land were certain hollows or openings partly caused by, and partly made to facilitate, the defendants' workings. Across the surface of their land ran a watercourse which, in the year 1865, the defendants diverted into a new channel. In 1871 the banks of this watercourse, which were sufficient for all ordinary occasions, burst, owing to exceptionally heavy rains, and the water escaped into the hollows, and thence by cracks and fissures passed into plaintiff's mine. The defendants were not guilty of any actual negligence. On the trial of an action for damages, Lush, J., held that the case was governed by *Fletcher v. Rylands*, and that the defendants were absolutely liable; he refused to receive evidence that the defendants had taken every reasonable precaution to guard against ordinary emergencies, and

N. S. 376; and see per Lord Cranworth in *Rylands v. Fletcher*, L. R., 3 H. L. 341; see *Hipkins v. Birmingham and Stafford Gas Co.*,

6 H. & N. 250.

¹ L. R., 19 Eq. 115.

² 2 App. Cas. 731.

directed a verdict for the plaintiff. This ruling was upheld by the Court of Exchequer;¹ but the Court of Exchequer Chamber directed a new trial, on the ground that the case was not beyond all question governed by *Fletcher v. Rylands*, and that if evidence had been received there might have been questions for the jury.² On the second trial, Pollock, B., left five questions to the jury:—1st. Was the mine flooded from natural causes, or from anything done by the defendants? Answer: From the acts of defendants. 2nd (a). Was the flooding occasioned, in whole or in part, by the diversion of the stream? Answer: In part, and chiefly, by the diversion of the stream. 2nd (b). Or by the deficient condition of the new channel, and the banks thereof? Answer: And by the condition of the new channel. 2nd (c). Was the stream in its diverted course more likely to overflow in time of flood; and would its overflow do more damage to the plaintiff than if it had been allowed to flow in its former channel? Answer: The stream in its diverted course would be more likely to overflow, and so do more damage to the plaintiff. 3rd. Was the flooding occasioned by the failure of the diverted channel, or other means, to intercept the surface water on the broken ground? Answer: Yes. 4th. Was the flooding caused not by the insufficiency of the channel, but by the result of the exceptional rainfall? Answer: The rainfall was exceptional, but the new channel was insufficient. 5th. Was what was done by the defendants in the ordinary, reasonable, and proper working of their mine? Answer: Yes, if the diversion of the stream had been properly executed. The verdict was entered for plaintiff, and a rule for a new trial discharged; and on appeal that decision was affirmed.

On appeal to the House of Lords this decision was again affirmed.³ Their lordships were of opinion that as the jury had found the new channel not to be so efficient as the old one, and, therefore, not sufficient to carry off rainfall, not

¹ L. R., 7 Ex. 315.

³ 2 App. Cas. 781.

² L. R., 9 Ex. 64.

exceptional, the defendants were responsible at all events. With regard to the duty imposed upon persons so altering a natural channel, Lord Penzance, in whose opinion the remainder of the House concurred, thus expresses himself. "In diverting it, what were these obligations? " Was it enough to make the new and artificial water-courses as efficient, but no more so than the old and natural one, so that whatever defects, incapacity, or otherwise, the old one might have had, might, without responsibility, be produced in the new one? or, secondly, " were they bound (as they, for their own convenience, " were making a new and artificial watercourse) to construct " it in such a manner that it would be capable of conveying " off the water that might flow into it from all such floods " and rainfalls as might reasonably be anticipated to " happen in that locality? or, thirdly, were they bound to " make provisions for any such quantities of water as " might possibly be discharged into it from any mere " rainfall, however heavy, however unusual, and however " contrary to all previous experience? For my own part, " I incline to think that the second proposition defines the " true measure of the defendants' obligations, but I desire " to express no positive opinion to that effect."¹

Extraor-
dinary rain-
fall; *vis major*
or the act of
God, how far
an excuse at
common law.

In the case of *Nichols v. Marsland*,² where the defendant formed artificial ornamental pools by damming up a natural stream, and an extraordinary rainfall burst the dams and injured the plaintiff's property, and the jury found that there was no negligence in the maintenance and construction of the pools, and that the flood was so great that it could not reasonably have been anticipated, though if it had been anticipated, the effect might have been prevented; it was held, affirming the judgment of the Court of Exchequer, that this was in substance a finding that the escape of water was caused by the act of God, or *vis major*, and that the defendant was not liable. Mellish, L. J.,

¹ See *A.-G. v. Tomline*, 40 L. T., N. S. 775, where this and the preceding cases are discussed by

Fry, J.

² 2 Ex. Div. 1 (C. A.); L. R., 10 Ex. 255.

delivering the judgment of the Court, says: "It appears
 " to us that we have two questions to consider:—First,
 " the question of law which was left undecided in *Rylands*
 " v. *Fletcher*,—Can the defendant excuse herself by show-
 " ing that the escape of the water was owing to *vis major*,
 " or, as it is termed in the law books, the 'act of God?'
 " and, secondly, If she can, did she in fact make out that
 " the escape was so occasioned? Now with respect to the
 " first question, the ordinary rule of law is, that when the
 " law creates a duty, and the party is disabled from per-
 " forming it without any default of his own—by the act
 " of God or the king's enemies—the law will excuse him;
 " but when a party by his own contract creates a duty, he
 " is bound to make it good, notwithstanding any accident
 " by inevitable necessity.¹ We can see no good reason
 " why that rule should not be applied to the case before
 " us. The duty of keeping the water in and preventing
 " its escape is a duty imposed by the law, and not one
 " created by contract. If, indeed, the making a reservoir
 " was a wrongful act in itself, it might be right to hold
 " that a person could not escape from the consequences
 " of his own wrongful act. But it seems to us absurd
 " to hold that the making or the keeping a reservoir is a
 " wrongful act in itself. The wrongful act is not the
 " making or keeping the reservoir, but the allowing or
 " causing the water to escape. If, indeed, the damages
 " were occasioned by the act of the party without more—
 " as where a man accumulates water on his own land, but
 " owing to the peculiar nature or condition of the soil, the
 " water escapes and does damage to his neighbour—the
 " case of *Rylands v. Fletcher* establishes that he must be

¹ See *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, where it was held that under the Pier and Harbour Act, 10 Vict. c. 27, where damage had been occasioned to a pier by a vessel through the violence of the wind and waves,

at a time when the master and crew had been compelled to leave the vessel, and had, consequently, no control over her, the owners were not liable. See *post*, p. 142, and Ch. VII.

“ held liable. The accumulation of water in a reservoir
“ is not in itself wrongful; but the making it and suffer-
“ ing the water to escape, if damage ensue, constitute a
“ wrong. But the present case is distinguishable from
“ that of *Rylands v. Fletcher* in this,—that it is not the act
“ of the defendant in keeping this reservoir—an act in
“ itself lawful—which alone leads to the escape of the
“ water, and so renders wrongful that which but for such
“ escape would have been lawful,—it is the supervening
“ *vis major* of the water caused by the flood which, super-
“ added to the water in the reservoir (which would of
“ itself have been innocuous), causes the disaster. A de-
“ fendant cannot, in our opinion, be properly said to have
“ caused or allowed the water to escape, if the act of God
“ or the queen’s enemies was the real cause of its escaping
“ without any fault on the part of the defendant. If
“ a reservoir was destroyed by an earthquake, or the
“ queen’s enemies destroyed it in conducting some war-
“ like operations, it would be contrary to all reason and
“ justice to hold the owner of the reservoir liable for any
“ damage which might be done by the escape of the water.
“ We are of opinion, therefore, that the defendant was
“ entitled to excuse himself by proving that the water
“ escaped through the act of God. The remaining ques-
“ tion is, did the defendant make out that the escape of
“ water was owing to the act of God? Now the jury
“ have distinctly found, not only that there was no negli-
“ gence in the construction or the maintenance of the
“ reservoirs, but that the flood was so great that it could
“ not reasonably have been anticipated, although if it had
“ been anticipated, the effect might have been prevented;
“ and this seems to us in substance a finding that the
“ escape of water was owing to the act of God. However
“ great the flood had been, if it had not been greater than
“ floods that had happened before, and might be expected
“ to occur again, the defendant might not have made out
“ that she was free from fault; but we think she ought

“not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate. In the late case of *Nugent v. Smith*,¹ we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.² It was, indeed, ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God; because the weight of the water originally in the reservoirs must have contributed to break down the dams as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is, in point of law, the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow.”³

In the case of *Nield v. London and North Western Railway* it was held, that where water causing damage was not brought there by the owner of an artificial water-course, but was the result of circumstances over which he had no control—such as the sudden overflow of an adjoining stream—he was not liable for the damage.⁴

In *Harrison v. Great Western Railway*,⁵ where the defendants were charged with repairing a drain, and the drain burst during a period of extraordinary rainfall, Pollock, C. B., delivering the judgment of the Court,

¹ 1 C. P. Div. 423. James, L. J., there defines the act of God as “Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains and care reasonably to have been expected.”

² See per Bramwell, B., in this case in the Court of Exchequer, L. R., 10 Ex. 255, where he defines the act of God as “A state of circumstances practically, if not physically, impossible to prevent.”

³ See *Madras Rail. Co. v. Zemindar of Carventenagarum*, L. R., 1 Ind. App. 364, where it was

held that, where it is the duty of the zemindar to maintain the tanks on his zemindary which are part of the national system of irrigation recognized by the laws of India, and the banks of the tank are washed away by an extraordinary flood without negligence on his part, the zemindar is not liable for damage caused by the escape of the water.

⁴ L. R., 10 Ex. 4.

⁵ *Harrison v. G. W. Rail. Co.*, 11 Jur., N. S. 992; see also *Forward v. Pittard*, per Lord Mansfield, C. J.; 1 T. R. 33; Bell’s Dict. & Dig. of Sc. Law, p. 11; Broom’s Legal Maxims, 5th ed. p. 530.

says, "There was nothing in the weather of so extraordinary a character, that the defendants were not bound to anticipate it. The storm, though unusual and extraordinary in a sense—yet, as happening once in a year, or in a few years, was not unusual;" and the defendants were held responsible. But where pipes burst, owing to an unprecedented frost, such as no reasonable man could have provided against, a water company were held not liable for the damage caused.¹ So where defendant, the landlord of a house, let the lower floor to plaintiff, and without any default in defendant, a rat eat a hole in a cistern, and plaintiff's goods were damaged by the water, he was held not liable; Kelly, C. B., being of opinion that the damage was caused by *vis major*.² In *Box v. Jubb*,³ the owner of a reservoir was held not responsible for damage done by the overflow of his reservoir, caused by the emptying of a reservoir belonging to a third person, and by an obstruction in a drain not under his control.

Where liability is imposed by contract or Act of Parliament.

From the above cases there is no doubt but that where a duty is cast on an individual by common law, he may excuse himself by showing that the performance of this duty was prevented by circumstances over which he had no control, amounting to *vis major*, or the act of God. Where, however, he contracts that he will be liable at all events, or where a contract is made which does not expressly or impliedly except the act of God, the Courts cannot introduce that exception by intendment of law.⁴ "If," says Cairns, L. C., in *The River Wear Commissioners v. Adamson*, "a duty is cast on an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that

¹ *Blyth v. Birmingham Water Co.*, 11 Ex. 781; see *Withers v. North Kent Rail. Co.*, 27 L. J., Ex. 417.

² *Carstairs v. Taylor*, L. R., 6 Ex. 217; see also *Boughton v. Mid. & G. W. Rail. Co., Ir. R.*, 7 C. L. 169.

³ 4 Ex. Div. 76; *Boughton v.*

Mid. & G. W. Rail. Co., Ir. R., 7 C. L. 168.

⁴ Per Lord Blackburn in *River Wear Commissioners v. Adamson*, 2 App. Cas. 771; *Paradine v. Jane*, Aleyn, 26; *R. v. Leigh*, 10 A. & E. 398; 2 App. Cas. 750.

“which is impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damages occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man, or by the act of God.”¹

“It is quite true,” says Lord Blackburn in the same case, “that where a duty is imposed by law, if the performance of the duty is rendered impossible by the act of God or the king’s enemies, the non-performance of the duty is excused. *Paradine v. Jane*,² which is the case generally cited for that position, is one in which the point did not arise. Prince Rupert and his cavaliers, if they were to be considered the king’s enemies, by driving away the defendant’s cattle and burning his crops, may have reduced the defendant to poverty, but did not render the payment of his rent to his landlord impossible in any other sense than they rendered the payment of any other debt to any other creditor impossible; nor in the present case is there any impossibility in the owner making good the damage caused by the act of God, any more than if caused otherwise. The case of *Paradine v. Jane*² was one in which it was attempted to argue that the duty imposed by the contract to pay rent was subject to a condition that the tenant should not be evicted by the act of God or *vis major*, and the really important part of the decision is that where a contract is made which does not either expressly or impliedly except the act of God, the Courts could not

¹ *River Wear Commissioners v. Adamson*, 2 App. Cas. 750; cf. *Carstairs v. Taylor*, L. R., 6 Ex. 217; *Nichols v. Marsland*, L. R., 10 Ex. 255; *Harrison v. G. W. Rail. Co.*, 10 Jur., N. S. 992; *Blyth v.*

Birmingham Water Co., 11 Ex. 781; *Nitro-Phosphate Co. v. London Docks*, 37 L. T., N. S. 320; 9 Ch. D. 103.

² Aleyn, 26.

“introduce that exception by intendment of law; and
 “that makes strongly against the supposition that in
 “construing a statute, where the legislature might have
 “expressed, but did not express, such an exception, the
 “Court should introduce it.”

The act of
 God no excuse
 in cases of
 negligence.

In the case of *The Nitro-Phosphate Co. v. London Docks*,¹ the defendants were required by Commissioners of Sewers and by Act by Parliament to keep the wall of their dock at a certain height. They failed to do this, and an extraordinarily high tide overflowed their wall and caused damage to the plaintiffs. The plaintiffs contended that defendants were bound at common law to keep their wall at a reasonable height. The defendants alleged that the wall was high enough to keep out all ordinary tides, and that the damage was caused by the act of God. They also contended that if they were liable to any damage at all, they could not be held responsible for the damage which was caused by the water which would have come over their wall if it had been at the prescribed height.

Fry, J., held that as the wall had been high enough to keep out all previous floods, and as the flood in question was of such an extraordinary character as to amount, in his opinion, to the act of God, he would have had great difficulty in coming to the conclusion that the defendants were responsible at common law, but that as the Act of Parliament imposed upon them the duty of keeping the wall at a certain height, and they had failed to do so, they were guilty of negligence, and responsible for the whole damage; for that where a person has a duty cast upon him, and does not perform it, he cannot rely on the act of God as any excuse at all. The Court of Appeal affirmed the decree of Fry, J., with a variation. They held that the defendants were bound at common law, independently of the statute, to keep their part of the wall at the height prescribed by the Commissioners of Sewers, and that the extraordinarily high tide, though the

¹ 37 L. T., N. S. 330.

act of God, did not excuse them from their liability; but that they ought to have an opportunity of showing that the damage done by the act of God and the damage caused by their negligence could be ascertained and apportioned.¹

Where the bringing or storing up of water is authorized by Act of Parliament, there is no liability on the persons so authorized for damage done in the due exercise of their statutory powers, in the absence of negligence; but an action will lie for doing that which the legislature has authorized, if it be done negligently. The law as above stated was laid down in the House of Lords in a late case, in which Lord Blackburn further defines negligence as follows:² "I think that if, by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is within this rule 'negligence' not to make such reasonable exercise of their powers."

Liability where works are authorized by act of Parliament.

In the case of *Geddis v. Bann Reservoir*,³ the defendants were authorized to collect water into a reservoir, and, when necessary, to send the waters down a channel to the river Bann. They were empowered to enter on lands to scour and cleanse channels and watercourses. They neglected to keep the channel in question cleared and scoured, so that at times it overflowed, and did damage to the lands of the adjoining proprietors. It was held that they were responsible for the damage so occasioned. In a similar case, where the damage was caused by an obstruction in a public sewer not under the control of the defendants, they were held not responsible.⁴ A canal was

¹ 9 Ch. D. 403; see *ante*, Ch. I. p. 29.

² *Geddis v. Bann Reservoir*, 3 App. C. 430; *Hammersmith Rail. Co. v. Brand*, L. R., 4 H. L. 171; *Lawrence v. G. N. Rail. Co.*, 16 Q. B. 643; *Weld v. Gaslight Co.*, 1 Stark. 189. See also *Collins v. Middlesex Level*, L. R., 4 C. P. 279; *R. v. Pease*, 4 B. & A. 30; *Jones v. Ffestiniog Rail. Co.*, L. R., 3 Q.

B. 733; *Bagnall v. L. & N. W. Rail. Co.*, 1 H. & C. 544; *Whitehouse v. Birmingham Canal*, 27 L. J., Ex. 25; *Cockburn v. Erewash Canal*, 11 W. R. 34; *Madras Rail. Co. v. Zemindar of Carventenagarum*, 22 W. R. 865.

³ 3 App. C. 430.

⁴ *Boughton v. Mid. & G. W. Rail. Co.*, Ir. R., 7 C. L. 169.

made under an Act of Parliament, the minerals being reserved to the owners of the land over which it passed, who might work them on giving three months' notice to the canal owners, who, in their turn, might prevent the working on payment to the owners of the value of the minerals. The plaintiffs, the landowners, gave due notice, and the canal company refused to purchase the mines. Thereupon the plaintiffs worked the mines without negligence, but without any regard to supporting the surface under the canal. The canal owners did all in their power to keep the canal water-tight, but the water escaped and flooded the plaintiff's mines. The Court held that no action would lie for the damage so caused, for that, striking out the charge of negligence, which was negatived, the canal company were charged with nothing, but that they brought water into the canal near the plaintiff's mines, and that they had full powers under their Act to bring the water there.¹

Where a railway was constructed by Act of Parliament, and carried along an embankment in lowlands adjoining a river, between the river and plaintiff's lands, the lowlands were separated from plaintiff's land by an embankment which, before the railway embankment was made, was sufficient to protect his land from the flood waters of the river, but, in consequence of the railway embankment, the flood waters were unable to spread over the lowlands as formerly, and flowed over the bank into plaintiff's lands:—held, that, although the railway company were not, by their Act, to make flood openings, yet, as they might, by proper caution, have prevented the injury to plaintiff, an action was maintainable; and that the compensation awarded to the owner of the land, before the railway was made, did not include the unforeseen damage in the present case.²

¹ *Dunn v. Birmingham Canal*, L. R., 8 Q. B. 42. For further cases as to the liability of canal and

water companies, see Ch. V., *post*.
² *Lawrence v. G. N. Rail. Co.*, 16 Q. B. 643.

Negligence is defined by Alderson, B.,¹ as follows:—
 “Negligence is the omission to do something which a
 “reasonable man, guided upon those considerations which
 “ordinarily regulate the conduct of human affairs, would
 “do; or doing something which a prudent or reasonable
 “man would not do.” Ignorance of the existence of a
 cause of mischief has, moreover, been held to be no excuse,
 where the ignorance is the result of culpable negligence².

Negligence
defined.

A riparian owner on inland waters has, it would seem, an ordinary right *prima facie* to protect his land from the inroads of flood water, provided he can do so without injury to others.³ It has been already stated with regard to the sea, that every landowner exposed to its inroads has a right to protect himself by erecting such works as are necessary for that purpose; and that if he acts *bonâ fide*, he is not liable for any damage thereby occasioned to his neighbours, who must protect themselves.⁴ The law does not appear,—except, perhaps, in the case of extraordinary floods,—to give such large powers for protection to the owners on the banks of inland waters, whether tidal or not. Thus it has been laid down by the House of Lords, that riparian owners on the banks of a non-tidal river may protect their property from the invasion of the water by building a bulwark *ripæ muniendæ causâ*; but that even in this necessary defence of themselves, they are not at liberty to conduct their operations so as to do any actual injury to the property on the opposite side of the river, or above or below them.⁵ “Mere apprehension, however,” says Lord Chelmsford, “will not be sufficient to found a
 “complaint of the acts done by the opposite proprietor;
 “because, being on the party’s own ground, they were
 “lawful in themselves, and only became unlawful in their

Right of ripa-
rian owner to
protect his
land from
floods.

¹ *Blyth v. Birmingham Water Co.*, 11 Ex. 734.

Commissioners of Pagham Level, 8 B. & C. 355.

² *Mersey Docks v. Gibb*, L. R., 1 H. L. 93.

⁵ *Bickett v. Morris*, L. R., 1 Sc. App. 47; *Orr Ewing v. Colquhoun*, 2 App. C. 839. See *A.-G. v. Lonsdale*, L. R., 7 Eq. 377.

³ *R. v. Trafford*, 8 Bing. 204; 1 B. & A. 874.

⁴ See *ante*, Ch. I. p. 32; *R. v.*

“consequences, upon the principle of *sic utere tuo ut alienum non ledas*. But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor; and, therefore, the act being *prima facie* an encroachment, the onus seems properly to be cast upon the party doing it to show that it is not an injurious obstruction.”

No right to throw the water on to the opposite proprietors in times of ordinary flood.

“A proprietor on the banks of a river,” says Lord Lyndhurst,¹ “has no right to build a mound which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood throw the water of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them. It is clear beyond the possibility of a doubt that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a sort of new water way, to the prejudice of the proprietors on the other side. The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel. I am not talking of that which it takes in extraordinary or accidental floods; but the ordinary course of the river at the different seasons of the year must, I apprehend, be subject to the same principles. Erskine, in his *Institutes*, says: ‘When a river threatens an alteration of its present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark “*ripæ muniendæ causâ*” to prevent the loss of ground that is threatened by that encroachment.’ Though the river threatens to change its channel and to encroach upon your land, you cannot protect yourself to the prejudice of the opposite proprietor. It is true that passages may be found in the *Digest* (Roman) appearing to have

Bulwarks
ripæ muni-
endæ causâ.

¹ Bli., N. S. 414 (H. L.); *Orr v. Bickett* 11 Q. B. 111; *Ewing v. Colquhoun*, 2 App. C. 839; *Bickett v. Morris*, L. R., 1 Sc. 47, ante, p. 73 et seq.

“ a contrary tendency, but I think they may all be
 “ reconciled; and I consider the subject in this light,—
 “ that these passages to which I am now alluding have
 “ reference to accidental and extraordinary casualties
 “ from the flood suddenly bursting forth; and they go
 “ to this,—that in such a case the parties may, for the
 “ sake of self-preservation, guard themselves against the
 “ consequence. *Farquharson v. Farquharson* is distin-
 “ guishable in every particular. There it was held, that
 “ where Invercauld had erected a mound on his ground
 “ to prevent the old course of the river being (gradually)
 “ altered, and there was evidence to show that a great
 “ part of the bank was built on old foundations, and of
 “ a custom of the county for opposite proprietors to
 “ embank under these circumstances, the Court gave their
 “ opinion in favour of Invercauld.”

With regard to such extraordinary floods as would
 come within the definition of extraordinary casualties, it
 would seem from the opinion of Lord Lyndhurst in the
 case just cited, as well as from the words of Bramwell, B.,
 in a late case, that a riparian owner may exercise a
 reasonable selfishness in protecting himself from such a
 common enemy.

In the case of *Nield v. L. & N. W. Rail. Co.*,¹ where a
 flood occurred in a canal from the bursting of the banks
 of an adjoining river, and the defendants, the canal com-
 pany, placed a barricade across the canal above their
 premises, and thereby flooded the plaintiff's premises, it
 was held they were not liable for the damage. “ The
 “ flood,” says Bramwell, B., “ is a common enemy against
 “ which every man has a right to defend himself, and
 “ it would be mischievous if the law were otherwise,
 “ for a man must then stand by and see his property
 “ destroyed, out of fear lest some neighbour might
 “ say, ‘ You have caused me an injury!’ The law

Extraordi-
nary floods.

The flood is a
common
enemy.

¹ L. R., 10 Ex. 4.

“allows, I may say, a kind of reasonable selfishness in such matters; it says, ‘Let every one look out for himself, and protect his own interest,’ and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, ‘Why did not you do the same.’ I think what is said in *Menzies v. Earl of Breadalbane* is an authority for this, and the rule so laid down is quite consistent with what one would understand to be the natural rule. Where, indeed, there is a natural outlet for natural water, no one has a right for his own purpose to diminish it, and if he does so, he is, with some qualification, perhaps, liable to any one who has been injured by his act, no matter where the water which does the mischief comes into the watercourse,—I say with some qualification, because it may be that even in the case of a natural watercourse, the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water.”

The Right to Water in its Natural Quality.

With regard to this subject, we propose to treat, in the first place, of the common law rights and liabilities of riparian owners with regard to water in its natural quality, and then to consider the various statutes which have been passed imposing penalties on the pollution of streams, and the modifications made by them in the common law.

At common law incident to the land through which it flows.

A riparian proprietor on a natural stream has a right to the flow of the stream through or by his land in its natural state as an incident to the land through or by which it flows, and if the water be polluted, so as to occasion damage in law, though not in fact, it gives him a good cause of action, unless a right to pollute the stream has been acquired by the person causing the pollution, by

long enjoyment or grant.¹ A right to pollute a stream can only be acquired by a continuance of a perceptible amount of pollution for the full period of twenty years.² A riparian proprietor can therefore maintain a suit to restrain the fouling of the water without showing that the fouling is actually injurious to him, and the fact that the stream is also fouled by others is no defence.³ The rights of a riparian proprietor are, moreover, not restricted to the present modes of enjoyment of the water, and a new mode of enjoyment gives a right at once to sue for an injury done in respect of such new uses.⁴

Pollution actionable without proof of actual injury.

In the case of *Crossley v. Lightowler*,⁵ the plaintiffs, who owned a carpet manufactory near the river Hebble, purchased from the defendants a piece of land abutting on the river and higher up the stream. The defendants erected dye works still higher up the stream, and the plaintiffs filed a bill to restrain the defendants from fouling the water of the river, both with respect to the carpet manufactory and with respect to the piece of land. The plaintiffs failed to prove pollution opposite to the carpet manu-

¹ *Wood v. Waul*, 3 Ex. 748; *Embrey v. Owen*, 6 Ex. 153; *Tenant v. Goldwin*, 2 Lord Raymond, 1039.

² *A.-G. v. Halifax*, 39 L. J., Ch. 129; *Goldsmith v. Tunbridge Wells*, L. R., 1 Ch. 349; *Cater v. Lewisham*, 11 Jur., N. S. 340; and *post*, Ch. IV.

³ *Crossley v. Lightowler*, L. R., 2 Ch. 478; 3 Eq. 279; *St. Helens v. Tipping*, 11 H. L. 642; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769.

⁴ *Pennington v. Brinsop*, 5 Ch. D. 769; *Holker v. Porrit*, L. R., 10 Ex. 59; *A.-G. v. Birmingham*, 4 De G. & J. 528.

⁵ L. R., 2 Ch. 478; L. R., 3 Eq. 279. In the case of *Duke of Buccleuch v. Cowan* (Court of Session Cases (Scotch), 3rd series, Vol. 5, p. 214), it was held that "an upper

proprietor is not entitled to throw impurities, and especially artificial impurities, into a stream so as to pollute the water as it passes through the estate of a lower proprietor; that the lower proprietor is entitled to complain of such pollution as renders the water unfit for primary purposes; but that it will be a good defence against such a complaint that the stream has been from time immemorial devoted to secondary purposes, such as manufactories, so as to supersede and abrogate the primary purposes. See L. R., 2 App. C. 344, where the judgment was affirmed, and it was held that by the law of Scotland, in the case of the pollution of a stream, the several sufferers may continue and bring a joint action against the several authors of the nuisance.

No defence
that the
water was
polluted by
others.

factory, but as they proved pollution opposite the piece of land higher up the stream, Wood, V.-C., and Lord Chelmsford, L. C., on appeal, both held that they were entitled to an injunction, although they proved no actual injury. It was held, moreover, in the same case, following the case of *The St. Helens Smelting Co. v. Tipping*,¹ that it was no defence that the water was also fouled by other manufacturers. "Where there are many existing nuisances," says Chelmsford, L. C., "either to air or water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follow,—that if the plaintiff were to make terms with the other polluters of the stream, so as to have water free from impurities produced by their works, the defendants might say, 'We began to foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.'"²

With regard to this last point, Fry, J., observes in a late case,³ "I may observe in passing, that the case of a stream affords a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is, to a riparian proprietor below, both an injury and damage, whilst the pollution of a stream already made foul, unless by other pollutions, is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions." On the same principle that the right to the flow of pure water is a natural right of property, it is no defence to an action for polluting a stream to show that

¹ 11 H. L. C. 642.

² L. R., 2 Ch. Ap. 482.

³ *Pennington v. Brinsop Hall Co.*,
5 Ch. D. 769.

the trade causing the nuisance was carried on in a proper and lawful manner.¹

The pollution of water then is, in itself, an unlawful act and a nuisance, and in this differs from the diversion or obstruction of a stream, which when done in a reasonable manner and on a man's own land is a lawful use of property.² It is established law, that if filth is created on any man's land, then he whose it is must keep it, that it may not trespass;³ and that, therefore, where a man, by an artificial channel or otherwise, discharges directly on to his neighbour's premises polluted water to his injury, he is liable to an action for nuisance.⁴ For no man can have a right to send dirty water on to another's land, unless he can prove a prescriptive right so to send dirty water.⁵ It has been further decided that there is no difference with regard to the natural right to purity of water between the cases of water flowing openly on the surface of land in a defined channel, and water trickling over the ground without any defined course, or water percolating through the soil in unknown or undefined channels.⁶ This is established by the case of *Hodgkinson v. Ennor*,⁷ where it was urged that the principles of law relating to the diversion or obstruction of percolating water established in *Chasemore v. Richards*⁸ applied equally to pollution of such water; and that, therefore, no action would lie for injury to a landowner by the pollution of percolating water, by washing lead on his land in the ordinary way. The Court, however, held, that though the person polluting the water

Pollution in itself an unlawful act, and differs in this respect from diversion and obstruction.

Pollution of surface and percolating water actionable.

¹ *Stockport v. Potter*, 7 H. & N. 160; see *Hipkins v. Birmingham*, 6 H. & N. 250; 5 H. & N. 74; *St. Helens v. Tipping*, 11 H. L. 642.

² See *ante*, p. 115 *et seq.*

³ *Tenant v. Goldwin*, 2 Ld. Raym. 1089; Salk. 21, 360; Mod. 311; Holt, 500; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Fletcher v. Rylands*, L. R., 3 H. L. 330.

⁴ *Herdman v. N. E. Rail. Co.*, 3 C. P. D. 168 (C. A.); *Humphries v. Cousins*, 2 C. P. D. 239; *Broder*

v. Saillard, 2 Ch. D. 692; *Bell v. Twentyman*, 1 Q. B. 768.

⁵ See *Cawkwell v. Russell*, 26 L. J., Ch. 34.

⁶ See Goddard on Easements, p. 64.

⁷ 4 B. & S. 229; 32 L. J., Q. B. 231; *Womersley v. Church*, 17 L. T., N. S. 190; see also *Manchester and Sheffield Rail. Co. v. Worksop*, 23 Beav. 198.

⁸ 7 H. L. 349; 29 L. J., Ex. 81; see *post*, p. 199.

might have a right to use it for lead-washing, yet according to the maxim, *sic utere tuo ut alienum non ledas*, he could not so use it as to injure and cause a nuisance to his neighbour.

Pollution of
artificial
watercourses.

It has been before stated,¹ that where a riparian owner diverts for the purpose of his tenement the waters of a natural stream by artificial means, he has the same rights on the new artificial channel cut through his riparian lands as he had on the original stream. A consideration of the above cases, and of those cited below, will show that some difference of opinion exists as to the liability of persons who discharge foul water without a prescriptive right not directly upon their neighbours' premises, or into a natural stream to the injury of riparian owners, but into a stream which reaches and is appropriated by the party complaining, owner of a non-riparian tenement, by means of an artificial channel on which he has, in the absence of prescription, no natural rights.²

Wood v.
Waud.

In the case of *Wood v. Waud*,³ which was the case of an artificial watercourse made for the purpose of draining certain mines, the Court held, that as the watercourse was of a temporary and uncertain nature, no rights existed or could be acquired on it so as to prevent its diversion or obstruction, but expressed an opinion that the injury caused by fouling water did not stand on the same footing as abstraction or diversion; and that though a mine owner might stop a stream of water which flowed artificially from his mines, it did not follow that he or any other could pollute it whilst it continued to run—and again, “If they polluted the water, so as to be injurious to the tenant below, the case would be different.”⁴

The modern cases hardly support this view of the law; and, after much difference of opinion among the learned judges who have considered the question, it would seem

¹ *Ante*, p. 122 *et seq.*; and see *Nuttal v. Bracewell*, L. R., 2 Ex. 1.

² *See ante*, p. 106, and *post*, Ch. IV.

³ 3 Ex. 748.

⁴ See also *Magor v. Chadwick*, 11 A. & E. 571; *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; 32 F. J., Q. B. 136.

that the injury by pollution is placed on the same footing as other injuries to riparian rights, and that though actual injury caused by the direct discharge of foul water on the premises of another is actionable as a nuisance, the pollution of the water in a stream can only be complained of by those entitled to the water as of right. In the case of *Whaley v. Laing*,¹ it appeared that a canal had been formed though land belonging to one Anderton; and the plaintiff, by leave of Anderton and of the canal company, made a cut through the land to the canal, for the purpose of taking water from the canal to supply his engines. Chemical works were afterwards erected by the defendants, and they commenced pouring muriatic acid into the canal, which mixed with the water and passed to the plaintiff's boilers, which were thereby injured. The question was, whether the plaintiff, as he had no legal right to the water, but merely a licence to use it, could sue the defendants for the damage. The declaration stated that the plaintiffs used and had and enjoyed the benefit of the water, which water had been used, and then ought to have run and flowed without pollution. The Court of Exchequer² held, without deciding whether the plaintiff had any possessory title in the water of the canal,—so that if the defendant had stopped the flow of it to the plaintiff, or if the plaintiff, in order to get the water, had to go to the canal and draw it with a bucket, any action could have been maintained,—that he was entitled to judgment on the ground that the defendant caused foul water to flow on to the plaintiff's premises without justification. They held, further, that the declaration did not mean an assertion of title in the plaintiff, but that the defendant had no right to foul the water. On appeal the Court of Exchequer Chamber³ were divided in opinion, Willes and Crowder, JJ., held that the judgment of the Court below ought to be affirmed, on the ground that the plaintiff was in

¹ 2 H. & N. 476; 3 H. & N. 675, Ex. Chamb.

² 2 H. & N. 476.

³ 3 H. & N. 675.

possession of the water, and the defendant was a wrongdoer. Crompton and Erle, JJ., held, that the declaration was bad, as it claimed indirectly a right to the flow of the water which was not supported by evidence of any legal right; but they added that they did not say that an action might not lie if a man had permission from the owner of a pond to get water for his cattle; and if a stranger, knowing the probable and natural effect of his act, poisoned the water so that the cattle were injured, that probably in such a case an action would lie; but that the right of action would be founded, not on the title or right to the water, but on the injury to the property of the plaintiff. Williams, J., held the declaration bad in substance, and that judgment should be arrested; but that the plaintiff was entitled to the verdict. Wightman, J., thought the defendants were entitled to judgment, as the plaintiff had no legal right to the water, and, that as against him, the defendants could not be considered wrongdoers. The result was that the verdict for the plaintiff was directed to stand, but judgment was arrested.¹

Stockport v. Potter.

In the case of *Stockport v. Potter*,² the majority of the Court of Exchequer, Pollock, C. B., Channell and Wilde, BB., held, that where a landowner on a natural stream conveyed to the plaintiffs, a water company, land not on riparian lands, and also the use of certain conduits and tunnels through the riparian lands, the grantees had no natural rights with regard to the stream, and, therefore, could not sue a higher riparian owner on the natural stream for the pollution of the stream, whereby the water flowing through their conduits was also polluted. Bramwell, B., dissented from this view, holding that the grantees could recover, on the general principle that where a man has property, he may grant to others rights in it, for which the grantees can sue. "In this case," he says,

¹ 3 H. & C. 901.

² 3 H. & C. 300; see *Nuttall v. Dracwell*, L. R., 2 Ex. 1.

however, "the plaintiffs cannot rely on their mere possession of the water they take, or perhaps, I ought to say, on their mere taking of it. For whatever *Whaley v. Laing* may have decided, it certainly decided this, that such possession was not enough to enable the possessor to maintain an action. For that case decides that the plaintiff had not alleged, or having alleged had not proved, a right to the water, and so could not recover."

In *Crossley v. Lightowler*,¹ cited above, Lord Chelmsford, L. C., held that the pollution of the water of a natural stream, which was conveyed to a mill by means of an artificial goit, was not an injury to the riparian rights of the owner of the mill, as the mill owner was not a riparian owner on the goit.

Crossley v. Lightowler.

Where an action for damages by a riparian owner lies for pollution of a stream, the Courts will interfere by injunction to restrain the nuisance, even where no actual damage is proved, to prevent the inconvenience of repeated actions for damages;² and also where the act done is claimed as of right, on the ground that the repetition of the act would, at the end of twenty years, establish a right in the claimant in derogation of the prior right.³

Injunction to restrain pollution.

When the right and its violation are clearly established, a man is, in general, entitled as of course to a perpetual injunction to prevent the recurrence of the injury;⁴ and in the case of an injury to riparian rights by pollution, the Courts will not, except in special cases, award damages in lieu of an injunction.⁵ Where the mischief complained of is an injury to a private right, the balance of convenience and inconvenience cannot be considered, the

¹ L. R., 2 Ch. 476, *ante*, p. 126.

² *Clowes v. Staffordshire Water Co.*, L. R., 8 Ch. 125, 143; *Pennington v. Brinsop Hall Co.*, 5 Ch. Div. 769; see also 24 & 25 Vict. c. 42.

³ *Swindon Water Co. v. Wilts and Berks Canal*, L. R., 7 H. L. 705; *Goldsmith v. Tunbridge Wells*, L. R., 1 Ch. 349; *Crossley v. Light-*

owler, L. R., 2 Ch. 478; *Harrop v. Hirst*, L. R., 4 Ex. 43.

⁴ *Wood v. Sutcliffe*, 2 Sim., N. S. 166; *Imperial Gas Co. v. Broadbent*, 7 H. L. 612; see Kerr on Injunctions, p. 44; and *post*, Ch. X.

⁵ *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769.

question being simply, whether such private rights exist, and, if so, whether the Court, in the exercise of its judicial discretion, can interfere to protect them.¹

Where the plaintiff has proved a right to an injunction, it is no part of the duty of the Court to inquire how the defendant can best remove the nuisance. The plaintiff is entitled to an injunction at once, unless the removal of the cause of injury is physically impossible; and the defendant must find his way out of the difficulty, whatever the inconvenience and expense may be.² Where the difficulty of removing the injury is great, the Court will suspend the injunction for a time, to render its removal possible.³ Where an injunction was granted to restrain defendant from pouring sewage into a river, and execution of the order was stayed till July 1st, and defendants did not, subsequently to July 1st, stop the nuisance, alleging that they had not yet found a way of deodorizing it, and that compliance with the order was physically impossible, it was held to be a gross and wilful contempt of Court, and sequestration was ordered to issue.⁴

In granting an injunction to restrain pollution by sewage matter, it is the practice to grant an immediate injunction restraining any new communications with the river, and to suspend the operation of the order for a time to enable defendants to comply with the order by altering their works.⁵ In the case of *Pennington v. Brinsop Hall Co.*,⁶ the plaintiffs, as riparian owners, sought a perpetual

*Pennington v.
Brinsop Hall.*

¹ *A.-G. v. Birmingham*, 4 Kay & J. 520.

² *Goldsmith v. Tunbridge Wells*, L. R., 1 Ch. 163; 1 Eq. 349; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Sheffield*, 3 D., M. & G. 304; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 39 L. J., Ch. 129; 17 W. R. 1088; *Cater v. Lewisham*, 11 Jur., N. S. 340; *A.-G. v. Hackney*, L. R., 20 Eq. 631.

³ *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Halifax*, 29 L. J., Ch. 129; *Pennington v. Brin-*

sop Hall Co., 5 Ch. D. 769; *A.-G. v. Birmingham*, 4 K. & J. 328.

⁴ *Spiker v. Banbury*, L. R., 1 Eq. 42.

⁵ *Goldsmith v. Tunbridge Wells*, L. R., 1 Ch. 163; 1 Eq. 349; *A.-G. v. Birmingham*, 4 K. & J. 528; 19 W. R. 561; *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769; *A.-G. v. Halifax*, 17 W. R. 1088; 39 L. J., Ch. 129; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146.

⁶ 5 Ch. D. 769.

injunction to restrain defendants, the owners of a colliery, from polluting the waters of a stream with sulphuric acid and other deleterious matters; and the defendants pleaded that their operations caused no appreciable injury to the plaintiffs; and further, that if the injunction was granted, they would have no means of getting rid of the water from their mines, and would have to shut up their colliery, and that the water would still find its way into the stream by natural causes; and that the closing of the colliery would cause a loss of 190,000% and the ruin of their company. They further urged that in lieu of an injunction damages ought to be awarded.¹ Fry, J., however, held, that the plaintiffs had a good cause of action, though the injury to their riparian rights was unaccompanied by damage, and awarded a perpetual injunction. In delivering judgment he says, "The plaintiffs claim both as riparian proprietors, and also as having a prescriptive right to the use of the water of the stream for the purposes of their mill. These rights are not denied by the defendants. The plaintiffs allege that the defendants pollute the stream so to create an injury to the plaintiffs' rights; and they say, first, that this injury is accompanied by damage; and, secondly, that if it be unaccompanied by damage, they have nevertheless a good cause of action. This second proposition of the plaintiffs is, in my judgment, well founded, and has scarcely, if at all, been contested by the defendants. The injury alleged by the plaintiffs is denied by the defendants, and the first question which I have to decide is, do the operations of the defendants cause an injury to the plaintiffs? I may observe, in passing, that the case of a stream affords a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul

¹ As to this, see *Aynsley v. Glover*, 163, 165; *Dent v. Auction Mart*, L. R., 18 Eq. 544; L. R., 10 Ch. 283; *Embrey v. Owen*, 6 Ex. 353, 368; *Wood v. Sutcliffe*, 2 Sim., N. S.

163, 165; *Dent v. Auction Mart*, L. R., 2 Eq. 238; *Leech v. Schweder*, L. R., 9 Ch. 463.

“and useless by other pollutions is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions.” (His lordship then reviewed the evidence, upon which he came to the conclusion that it proved that the water pumped by the defendants into the stream caused both injury and damage to the plaintiffs. He continued):—“It has, in the next place, been urged upon me that in lieu of an injunction I ought to award damages in this case. The argument has assumed this form. It has been said, and the case of *Embrey v. Owen*¹ has been referred to as an authority, that the cases of rights to running water, and of rights to air and light, are analogous; that in the case of injury done to the right to air and light the Court has frequently granted an inquiry as to damages in lieu of an injunction, and that it would be right and proper to follow the same course in this case. I am of opinion that I ought not to accede to this argument. In the first place, it is to be observed that the injury to air and light proceeds in almost all cases from a permanent structural obstruction; whereas the injury to water in the present case proceeds from a cause which varies from day to day, and may cease or may increase at any time. Hence follows a difference in the measure of damages in the two cases. In the case of an obstruction to light and air, the damages would represent the depreciation in value of the injured property, and so would be in the nature of a compensation for the injury done; whilst in the case of injury to the right to running water, the damages given only represent the past injury to the plaintiff's right; and are, consequently, no compensation for the future injury. Again, the rights of the plaintiffs, as riparian owners, are not limited to their present modes of enjoyment; and a new mode of enjoyment gives a right at once to sue for the injury done in respect of such new use, as

¹ 6 Ex. 353.

“ was determined in *Holker v. Porritt*,¹ and the cases
“ there cited. It is impossible to foresee what modes of
“ enjoyment the plaintiffs, or their successors in title, may
“ resort to, or the extent of damages which would be a
“ compensation for the injury which the continued pollu-
“ tion might cause to such new modes of enjoyment. I
“ shall not, of course, say that, in no case of injury to
“ riparian rights, damages should be awarded in lieu of
“ an injunction; but I know of no case in which it has
“ been done. In the case of *Clowes v. Staffordshire Potteries*
“ *Waterworks Co.*,² the point was considered by Lord
“ Justice Mellish; and although he was of opinion that
“ in that case the plaintiff could only have recovered
“ nominal damages, he nevertheless held that an in-
“ junction ought to issue, upon the ground of the
“ inconvenience of leaving the parties to repeated and
“ successive actions for damages. If, therefore, in the
“ present case, there had been no evidence of actual
“ damage, but merely evidence of injury to the riparian
“ and prescriptive rights of the plaintiffs, I should have
“ followed this authority; but there is evidence before
“ me which satisfies me that the damage accruing to the
“ plaintiffs is by no means inconsiderable. It has been
“ suggested that there are no known modes of purifying the
“ defendants’ water; and that obedience to the injunction
“ will be impossible, or possible only by stopping the
“ defendants’ works, and throwing out of employment
“ a large number of workmen. I cannot yield to these
“ suggestions, nor can I find any such balance of incon-
“ venience resulting from the granting of the injunction
“ as would have induced me to refuse it, even if I could
“ have assessed damages in the nature of a compensation,
“ which, for the reasons I have given, I am of opinion
“ that I cannot do. On the whole, therefore, I am of
“ opinion that a perpetual injunction should be awarded
“ to restrain the defendants from discharging water from

¹ Law Rep., 10 Ex. 59.² Law Rep., 8 Ch. 125.

“ their mines and colliery into the stream, so as to cause
 “ an injury to the plaintiffs’ mill, engine, boilers, and
 “ works, or other their premises in the pleadings mentioned,
 “ or so as to cause the stream to flow to the plaintiffs’
 “ mill and premises, in a state less pure than that in
 “ which it flowed thither previously to the commencement
 “ of the defendants’ pumping. If the defendants desire
 “ it, and will undertake to indemnify the plaintiffs to such
 “ an extent, and in such manner as the Court may direct,
 “ the injunction may be suspended for three months.
 “ There must be a reference as to damages sustained by
 “ the plaintiffs, and, in my opinion, the measure of these
 “ damages will be the expenses to which the plaintiffs
 “ have been put by the pollution of the stream. The
 “ defendants must pay the costs of the action.”

*A.-G. v.
 Birmingham.*

In the case of *A.-G. v. Birmingham*,¹ an injunction was granted to restrain the defendants from carrying out their drainage operations, so as drive away fish and prevent cattle from drinking the water of a river seven miles below the town, where it belonged to the plaintiff. Wood, V.-C., was of opinion that the defendants were not justified in causing a nuisance by their local Act of Parliament, which incorporated the *Towns Improvement Act*, 1847,² and that public works must be so executed as not to interfere with private rights of individuals. It was urged, on behalf of the defendants, that if the drains were stopped the whole sewage of the town would overflow and cause a pestilence, by which 250,000 people would suffer, and that, moreover, the sewage would empty itself into the river as before. The Vice-Chancellor says, “ It has been
 “ urged upon me, more than once, during the argument
 “ by the counsel for the defendants, that there are 250,000
 “ inhabitants in the town of Birmingham, and that this cir-
 “ cumstance must be taken into consideration in determining
 “ the question of the plaintiff’s right to an injunction.

“ I say the plaintiff’s right, rather than the right of

¹ 4 K. & J. 528 ; see also *A.-G. v. Birmingham*, 19 W. R. 561.

² 10 & 11 Vict. c. 34.

“ those other members of the community on whose behalf
“ the information is exhibited, because, as regards the
“ latter, there may be circumstances to be taken into con-
“ sideration which do not affect the question, so far as it
“ regards the plaintiff. There are cases at law in which
“ it has been held that where the question arises between
“ two portions of the community, the convenience of one
“ may be counterbalanced by the inconvenience to the
“ other, where the latter are far more numerous. But in
“ the case of an individual claiming certain private rights
“ and seeking to have those rights protected against an
“ infraction of the law, the question is simply, whether he
“ has those rights, and, if so, whether the Court, looking to
“ the precedents by which it must be governed in the exer-
“ cise of its judicial discretion, can interfere to protect them.

“ Now, with regard to the question of the plaintiff’s
“ right to an injunction, it appears to me that so far as
“ this Court is concerned, it is a matter of almost absolute
“ indifference whether the decision will affect a population
“ of 250,000, or a single individual carrying on a manu-
“ factory for his own benefit. The rights of the plaintiff
“ must be measured precisely as they are left by the legis-
“ lature. Now the plaintiff’s rights are these:—He has
“ a clear right to enjoy the river, which, before the defen-
“ dants’ operations, flowed unpolluted—or, at all events, so
“ far unpolluted that fish could live in the stream, and
“ cattle would drink of it—through his grounds for three
“ miles and upwards, in exactly the same condition in
“ which it flowed formerly, so that cattle may drink of it
“ without injury, and fish, which were accustomed to
“ frequent it, may not be driven elsewhere. He is entitled
“ to the full use and benefit of the water of the river just
“ as he enjoyed them before the passing of the Municipal
“ Act, unless there be in that Act something which says
“ he is not to enjoy them any longer. That is the only
“ question I have to try; and when I have tried that
“ question, I arrive at the measure of the rights of the

“ parties. As regards the discretion the Court should
“ exercise where such rights exist, if the plaintiff finds
“ the river so polluted as to be a continuous injury to
“ him,—if, in order to assert his right, he would be obliged
“ to bring a series of actions—one every day of his life—
“ in respect of every additional injury to his cattle, or
“ every additional annoyance to himself (not to mention
“ the permanent injury which he would sustain in having
“ the water—which, as it passes along the course of his
“ land, is his property—so damaged that he cannot use
“ it),—then the Court will properly exercise its discretion
“ by granting him an injunction to relieve him from the
“ necessity of bringing a series of actions, in order to
“ obtain the damages to which such continual and daily
“ annoyance entitles him.

“ In one respect it is true, arguments as to the dis-
“ cretion which the Court should exercise in a case like
“ the present may very properly be addressed to it,—
“ viz. that before granting an injunction and compelling
“ the sudden stoppage of works like these, inasmuch as
“ such an injunction might produce a considerable injury,
“ the Court, by way of indulgence, would afford the de-
“ fendants every conceivable facility to enable them to
“ remedy the evil complained of. But when I am told
“ that they have already done their utmost and spent all
“ their money in endeavouring to remedy that evil, and
“ that now, in order to discharge the duties imposed upon
“ them, they have no alternative but to override the rights
“ of private individuals, the answer is this—If they have
“ not funds enough to make further experiments, they
“ must apply to Parliament for power to raise more
“ money. If after all possible experiments they cannot
“ drain Birmingham without invading the plaintiff’s
“ private rights, they must apply to Parliament for power
“ to invade his rights; and if the case be one of such
“ magnitude as it is represented to be, Parliament, no
“ doubt, will take measures accordingly; and the plaintiff
“ will protect himself as best he may.”

The Courts will also interfere by injunction to prevent bodies possessing parliamentary powers from exceeding or abusing those powers to the prejudice of riparian owners, it being a principle of law that persons interfering with the property of others by an Act of Parliament are strictly tied down to the limits of the powers granted by the Act,¹—the question in such cases being, whether the nuisance complained of is or is not the necessary result of the works authorized by the Act.² Thus in *Clowes v. Staffordshire Potteries Water Co.*,³ where defendants had power to take the water of certain springs which supplied a river on which certain mills were situate, and to make a compensation reservoir for storing water during floods for the benefit of the mill-owners, and they erected a reservoir which had the effect of making the water of the river more muddy than it was before, and unfit for dyeing purposes; it was held that the Act gave the defendants no power to foul the water, and an injunction was granted; and further, that the compensation clauses of the *Waterworks Act of 1847* did not apply to the plaintiff's case, inasmuch as the injury was such as the water company were not authorized to commit. "I am of opinion," says James, L. J., "that this is a case pre-eminently for an application to this Court for an injunction upon two grounds. To one of these Mellish, L. J., has referred, —the absolute necessity of preventing a series of actions which would be the sole result if we remitted the party to what used to be called the other side of Westminster Hall. Beyond that, it has always been the practice of this Court, and one of the main duties of this Court, to take care that public bodies who obtain authorities under Acts of Parliament do not abuse their powers."⁴

So it was held in *A.-G. v. Hackney Local Board*, that the provisions of the *Metropolitan Management Act, 25 &*

¹ *Oldaker v. Hunt*, 19 Beav. 425.

Cobney Hatch, L. R., 4 Ch. 146;

Rex v. Pease, 4 B. & A. 30.

³ L. R., 8 Ch. 125.

⁴ *Ib.* 143.

² *A.-G. v. Metropolitan Board of Works*, 11 W. R. 820; see also *Blackburn, J.*, in *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; *A.-G. v.*

Injunctions to prevent bodies possessing Parliamentary powers from abusing them.

26 *Vict. c. 102*, s. 6, requiring a month's notice to be served before commencing proceedings against the Metropolitan Board of Works, did not affect the right of a riparian proprietor, whose stream is being polluted by the drainage works of a district board incorporated under the act, to a summary relief by injunction, as the nuisance was not an exercise of their parliamentary powers.¹ Similarly it has been held that the Metropolitan Board of Works are not authorized by sect. 135 of 18 & 19 *Vict. c. 120*, to turn into a navigable river the whole sewage of a district, not previously drained into it, so as to create a nuisance.² So a district board under the *Metropolitan Management Act*, 18 & 19 *Vict.*, are not empowered by their Act to pollute water beyond the district over which the board has authority.³ So in *A.-G. v. Cockermouth*, Jessel, M. R., granted an injunction to restrain a local board under the *Local Government Act*, 1861 (24 & 25 *Vict. c. 61*), from discharging sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge, though such pollution was imperceptible at a town six miles lower down the river.⁴ Moreover, when statutory powers are conferred under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise which render the exercise of them impossible without causing a nuisance, the persons so causing such nuisance are liable. Thus, where lessees of a canal company were empowered to take water from certain brooks for their canal, and the brooks became polluted and so caused the canal to become a public nuisance, they were held liable to an indictment, as their Act of Parliament did not enjoin but only empowered them to take the water in its pure state, and the legislature did not contemplate their taking it in a polluted state.⁵ The

¹ L. R., 20 Eq. 626.

² *A.-G. v. Metropolitan Board of Works*, 11 W. R. 820; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Birmingham*, 4 K. & J.

528; see *A.-G. v. Kingston*, 13 W. R. 888.

³ *Cator v. Lewisham*, 5 B. & S. 115.

⁴ L. R., 18 Eq. 172.

⁵ *Reg. v. Bradford*, 6 B. & S.

Court of Chancery in the same case granted an injunction restraining the nuisance, holding that the judgment of the Court of Queen's Bench was correct, and that the fact that an appeal was pending was no bar to an injunction; and further, that it was no defence for the company to say that they did not pollute the water, they having the power to draw it in or not as they pleased.¹

In the case of *A.-G. v. Leeds Corporation*,² an injunction was granted at suit of two landowners to restrain pollution by a sewer, although the sewer had existed sixteen years before bill filed. Lord Hatherley, L. C., remarks in his judgment, "The only point that really seemed to me to create any question in the cause was this, that all was done sixteen years ago; that a great deal of money was laid out in the construction of these works, and that the landowners and other persons injured might be affected by standing by and seeing an expenditure of money which they might know could only tend to one result, and was only intended for one purpose, which purpose must necessarily produce the result in question, and yet making no complaint. I think the true answer is that which had occurred to us before we called on Sir Roundell Palmer, viz.:—that when any person finds that the legislature has authorized a work to be done (and of course, the force of this is increased by the view we have taken, that the true construction of the Act is that it is to be done without creating a nuisance) he is not to assume it will create a nuisance. On the contrary, the presumption would be that the board would not do any thing unlawful."³ Acquiescence.

The Courts, moreover, will not interfere by injunction in the case of merely prospective injury; the nuisance must be actual and existing, and not future, however Future nuisance.

631; *Rex v. Pease* distinguished, as in that case the nuisance was the very thing contemplated by the legislature, and, therefore, the legislature had sanctioned it; 4 B. & A. 30.

¹ *A.-G. v. Bradford*, L. R., 2 Eq. 71; see also *Manchester and Sheffield Railway v. Workson*, 23 Beav. 198.

² L. R., 5 Ch. 583.

³ See also *A.-G. v. Halifax*, 39 L. J., Ch. 129; 17 W. R. 1088.

strongly the apprehension of injury may be supported by scientific evidence. In *The Attorney-General v. Kingston*,¹ the corporation of that town, under the *Towns Improvement Clauses Act*, proposed to make a single drain to convey into the Thames the sewage of the town, which had formerly been drained by cesspools, and also by direct communication with the river. The evidence showed that at least twice as much sewage would be thus discharged into the river, as under the old system; and two scientific witnesses² were of opinion that the proposed works would, in the course of time, by the formation of deposits of sewage matter, have a very noxious effect, and render the water unfit for drinking or domestic purposes. The Vice-Chancellor held that the defendants were not authorized by the statute to create a nuisance, but that, looking at the Act, the mere fact of draining into a navigable river was not to be considered as a nuisance, since it was authorized to be done, provided no nuisance was thereby occasioned; that had any case of injury to cattle from drinking the water, or to the inhabitants on the banks, been at all established, or established approximately, as likely to occur, then he should conceive it was a case for interference by injunction;³ but that nothing like such a case was shown by the evidence, and that the information should be dismissed.

Increasing
pollution.

If, however, some degree of present nuisance exists, the Court will take into account its probable continuance and increase.⁴ Thus, where the sewage of a town had for many years drained into a stream passing through plaintiff's land, without perceptibly polluting it, but, for some years before filing the bill, in consequence of the increase of the town, the stream became perceptibly polluted, and continued to increase in impurity, the Court of Chancery

¹ 13 W. R. 888.

² As to value of scientific evidence in cases of nuisance, see *A.-G. v. Colney Hatch*, L. R., 4 Ch. 156; *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 349.

³ See *A.-G. v. Hackney*, L. R., 20 Eq. 631; *Elliot v. North Eastern Rail. Co.*, 10 H. L. 333; 1 J. & H. 156; 2 D., F. & J. 423; *Elwell v. Crowther*, 31 Beav. 169.

⁴ *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 349.

granted an injunction restraining the draining of the sewage into the stream.¹

Although, as has been said, it is not necessary for a riparian owner to prove actual damage to enable him to sue for the interference with his right to pure water, yet it would appear that he must prove actual pollution of some character or another, and that the discharge of waste matter of an innocuous character is not actionable at common law. "It is not," says Mr. Angell,² "under all circumstances, an unreasonable or unlawful use of a stream, to throw or discharge into it waste or impure matter: whether such an act would be reasonable or not, in any given case, would be a question for the jury upon its circumstances. The same circumstances would be open for consideration, and the same rules would govern in this case, as in respect to the abstraction, detention, diversion, or obstruction of water in a stream. The size and character of the stream, the uses to which it can be or is applied, the nature and importance of the use claimed and exercised by one party, as well as the inconvenience or injury to the other party, would be subjects involved in the inquiry."³

What is
pollution.

Thus it has been held *at nisi prius* by Coleridge, J., that the merely making water temporarily muddy is not sufficient to maintain an action.⁴ So by the 20th sect. of the *Rivers Pollution Act*,⁵ it is provided that the word pollution shall not include, for the purposes of the Act, innocuous discoloration. In the case of *Lingwood v. Stowmarket*,⁶ Wood, V.-C., held that in an order for an injunction to restrain the pollution of a stream, it is proper to insert the words "to the injury of the plaintiff," in order to establish a ground for the interference of the Court, and to prevent its authority being invoked for

¹ *Ib.*; see also *A.-G. v. Sheffield*, 3 D. M. & G. 304; *A.-G. v. Leeds Corporation*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 39 L. J., Ch. 129.

² Angell on Watercourses, p. 240.

³ See per Lord Cairns in *Swindon*

Water Co. v. Wilts and Berks Canal, L. R., 7 H. L. 697.

⁴ *Taylor v. Bennet*, 7 C. & P. 329.

⁵ 39 & 40 Vict. c. 75, *post*, p. 174.

⁶ L. R., 1 Eq. 77; see *Dawson v. Paver*, 5 Ha. 422.

trivial purposes. So in *A.-G. v. Cockermouth*,¹ Jessel, M. R., refused to grant an injunction at the suit of a local board to restrain the defendants from discharging sewage into a stream eight miles above the intake of the plaintiff's waterworks, as the evidence showed that chemical analysis failed to detect any pollution in the water at the intake of the waterworks, though it was perceptibly polluted at the point of discharge. An injunction was, however, granted at suit of the Attorney-General on the ground that the defendants had infringed the 4th section of the *Local Government Act*, 1861. "Now "as I understood the law," says the learned judge, "it is "not necessary to prove any injury at all. The legislature "is of opinion that certain acts will produce injury, and "that is enough. The legislature is of opinion that it is "desirable to preserve our natural streams, at least, in "their present state of purity, and it therefore was said "that you shall not affect or deteriorate the water at all; "and the Court must presume that the deterioration of "the water is an injury which is prohibited by the legislature for good and sufficient cause."

Various sources of pollution have been held by our Courts to be actionable. Thus it has been held actionable to set up a lime-pit for calf and sheep skins so near water as to pollute it;² so erecting a cesspool so near a well as to contaminate it;³ so the letting off of water made noxious by precipitation of minerals;⁴ or dye wares, or liquors, or madder, or indigo, or potash,⁵ or sulphuric⁶ or muriatic⁷ acid; or discharging heated water into a stream injuriously,⁸ or sewage,⁹ or rendering water unfit for

¹ L. R., 18 Eq. 172.

² Year Book, Hen. II. b. 6; see *Moore v. Webb*, 1 C. B., N. S. 673.

³ *Norton v. Scholefield*, 9 M. & W. 565; *Womesly v. Church*, 17 L. T., N. S. 190.

⁴ *Hodgkinson v. Ennor*, 4 B. & S. 229; *Wright v. Williams*, 1 M. & W. 77.

⁵ *Wood v. Sutcliffe*, 16 Jur., N. S. 75.

⁶ *Pennington v. Brinsop*, 5 Ch.

D. 769.

⁷ *Stockport v. Potter*, 7 H. & N. 160.

⁸ *Mason v. Hill*, 2 B. & A. 304; *Wood v. Waud*, 3 Ex. 748; *Tipping v. Eckersley*, 2 K. & J. 264.

⁹ *A.-G. v. Cockermouth*, L. R., 18 Eq. 172; *A.-G. v. Leeds*, L. R., 5 Ch. 533; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Kingston*, 13 W. R. 888.

domestic or culinary purposes;¹ or rendering it unfit for cattle to drink of,² or fish to live in,³ or for manufacturing purposes.⁴

Where the pollution of a stream amounts to a public nuisance, the party causing it may be prosecuted by indictment, or proceeded against by information at the suit of the Attorney-General.⁵ An action will also lie for a public nuisance on proof of special damage.⁶

The statutory provisions restricting the pollution of water are numerous, but with the exception of the *Rivers Pollution Act of 1876*,⁷ they are either local, or deal with the pollution of water used for special purposes.

Thus sect. 1 of *The Waterworks Clauses Act, 1847*,⁸ subjects to a penalty not exceeding 5*l.* every person throwing rubbish, &c. into any stream, reservoir, or other works, or bathing in any stream, or causing the water of any sink, sewer, or drain, steam engine, boiler, or other filthy water to flow into any stream or reservoir belonging to any undertakers under the Act. Such person to forfeit in addition 20*s.* per diem for every day that such offence shall be committed.

The Public Health Acts and other Acts empowering local authorities (the place of which enactments has been taken by the *Public Health Act, 1875*) do not authorize local authorities to send sewage into a river to the prejudice of parties having established interests in the water.⁹

¹ *Goldsmid v. Tunbridge Wells, L. R.*, 1 Ch. 349.

² *A.-G. v. Birmingham*, 4 K. & J. 528; *Manchester Railway v. Workson*, 23 Beav. 198; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Oldaker v. Hunt*, 6 D. M. & G. 376.

³ *Bidder v. Croydon*, 6 L. T., N. S. 778; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Oldaker v. Hunt*, 6 D. M. & G. 376; *Aldred's case*, 9 Rep. 59 a.

⁴ *Clowes v. Staffordshire, L. R.*, 8 Ch. 142; *Crossley v. Lightowler*,

L. R., 2 Ch. 478; *Lingwood v. Stowmarket, L. R.*, 1 Eq. 77; *Tippling v. Eckersley*, 2 K. & J. 264; *Wood v. Sutcliffe*, 2 Sim., N. S. 163.

⁵ See *post*, Ch. X.

⁶ *Benjamin v. Stow, L. R.*, 9 C. P. 430; and see *post*, Ch. X.

⁷ 39 & 40 Vict. c. 75.

⁸ 10 & 11 Vict. c. 17. Sect. 2 of this Act defines streams to include "springs, brooks, rivers, and other running waters."

⁹ See *Oldaker v. Hunt*, 6 De G. M. & G. 376; *Bidder v. Croydon*, 6 L. T., N. S. 778; *A.-G. v. Luton*

Public nuisance.

Statutory restrictions on pollution.

Public Health
Acts.

By the *Public Health Act*, 1875,¹ sect. 332, it is provided, that "Nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir, canal, river, or stream, or the feeders thereof, or the supply, quality, or fall of water contained in any reservoir, canal, river, or stream, or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or to be relieved against the injuriously affecting such reservoir, canal, river, stream, feeders, or such supply, quality, or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid." This provision comes in place of sect. 70 of the *Local Government Act*, 1858, and sect. 45 of the *Nuisances Removal Act*, 1855, both repealed (the latter except as to the metropolis) by the Act of 1875.² By sect. 69, local authorities, with sanction of the Attorney-General, may take proceedings by indictment, bill in chancery, action or otherwise, for the purpose of restraining pollution.

By sect. 21 of the *Gasworks Clauses Act*, 1847, 10 Vict. c. 15, and by sect. 68 of the *Public Health Act*, 1875, any person engaged in the manufacture of gas who shall cause or suffer to be brought, or to flow into any stream, reservoir, aqueduct, pond, or place for water, or into any drain or pipe communicating therewith, any washing or other substance produced in making or supplying gas, or wilfully does any act connected with the making or supplying of gas, whereby the water of such stream, &c. is fouled, shall forfeit for each offence 200*l.*, and a further

Board of Health, 2 Jur., N. S. 180; *Manchester Railway v. Workson*, 23 Beav. 198; *Spokes v. Banbury*, L. R., 1 Eq. 42; *A.-G. v. Birmingham*, 4 K. & J. 428; *Cater v. Lewisham*, 5 B. & S. 115; *R. v. Darlington*, 5 B. & S. 515; *Goldsmid v. Tunbridge Wells*, 35 L. J., Ch. 88; L. R., 1 Ch. 349; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Cockermouth*,

L. R., 18 Eq. 172; *A.-G. v. Richmond*, L. R., 2 Eq. 306; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146. See also *A.-G. v. Basingstoke*, 45 L. J., Ch. D. 726; *St. Helens Chemical Works v. St. Helens*, 1 Ex. D. 196.

¹ 38 & 39 Vict. c. 55.

² Michael and Will's Law of Gas and Water, p. 212.

sum of 20*l.* per diem for every day during which the offence is committed.¹ The same penalty for wilfully corrupting water by gas washings is imposed by the *Nuisances Removal Act*, 1855. By sect. 25, where any water shall be fouled by gas (other than wilfully), the manufacturer is to forfeit 20*l.* for each offence, and 10*l.* per diem during continuance of offence.

By the *Thames Conservancy Act*, 1866,² sect. 63, any person causing any offensive or injurious matter to pass into the Thames between Cricklade and the western boundary of the metropolis, or any tributary within three, now by 33 & 34 *Vict. c.* 149, s. 7 (*Local*), five, miles of the Thames, measured in a direct line, is liable to a penalty not exceeding 100*l.*, and to a further penalty not exceeding 50*l.* for every day during which the offence is continued after the day on which the penalty is incurred. By sect. 64, the conservators are to give notice requiring the person passing the offensive matter into the stream to discontinue passing such matter; and, upon failing to comply with such notice, the person will be guilty of a misdemeanor.

Thames Conservancy Acts.

Similar provisions exist in the *Lee Conservancy Act*, 1868.

So also by the *Salmon Fisheries Act*, 1861,³ s. 5, any person putting into any water containing salmon, or into any tributary thereof, any liquid or solid matter to such an extent as to cause the water to poison or kill fish, shall incur penalties of 5*l.* for the first; 10*l.* and 2*l.* a day for the second; and 20*l.* a day for the third offence. If, however, he has used all means to render such matter harmless

Salmon Fisheries Acts.

¹ Under a private act of parliament, with similar clauses, a manufacturer was held liable for damage for escape of gas washings into a well, although the site of his tank was selected by a competent engineer; and although the escape was caused by the wrongful act of a third party who had worked

mines under his, the defendant's, land, and so caused a subsidence, which cracked the bottom of the tank; *Hipkins v. Birmingham Gas Co.*, 6 H. & N. 250; see also *Millington v. Griffiths*, 30 L. T., N. S. 65.

² 29 & 30 *Vict. c.* 89.

³ 24 & 25 *Vict. c.* 109.

he will not be so liable, and *nothing* is to prevent any person from *acquiring a legal right* in cases where he would have acquired it if the Act had not passed. By sect. 13 of the *Salmon Fisheries Act*, 1873,¹ the provisions of the 32nd section of 24 & 25 *Vict. c. 97* (the *Malicious Injuries to Property Act*), so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words "or in any salmon river" were inserted in the said section in lieu of the words "private right of fishing," after the words "noxious material in any such pond."²

The Rivers
Pollution Act.

The most important Act, however, relating to the pollution of streams is the *Rivers Pollution Act of 1876*, 39 & 40 *Vict. c. 75*, and as it is of universal application, and as

¹ 36 & 37 *Vict. c. 71*.

² Sect. 32 of 24 & 25 *Vict. c. 97* (1861), "An Act to consolidate and amend the statute law of England and Ireland relating to Malicious Injuries to Property," provides that, whosoever shall unlawfully or maliciously put any lime or other noxious material into any fish pond or any water which shall be private property, or in which there shall be any private right of fishery, with intent to destroy any of the fish, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding *seven* years, and not less than *three* years, or be imprisoned for any term not exceeding *two* years, with or without hard labour, and without solitary confinement; and, if a malicious offence, with or without whipping.

Among other acts the following deal with pollution:—

23 & 24 *Vict. c. 77*, s. 8, lays a penalty not exceeding 5*l.* on those fouling water of any well, fountain, or pump; and a further sum not exceeding twenty shillings per diem for every day during which the offence is continued.

28 & 29 *Vict. c. 75*, s. 10, empowers sewers authorities (defused

by sect. 3 to be the mayor and hurgesses, or lighting commissioners, or vestry, or town council, or police commissioners, or parochial board) to proceed by bill, indictment or action for protection against pollution with leave of the Attorney-General. By sect. 11, nothing in the act is to authorize any sewer to drain direct into any stream.

37 & 38 *Vict. c. 89* (An Act to amend the Sanitary Laws, 1874), s. 50, provides that, "If it shall be represented to any nuisance authority in the metropolis, or to any sanitary authority, that within their district the water in any well, tank or cistern, public or private, or supplied from any public pump, and used, or likely to be used for domestic purposes, is polluted so as to be injurious to health, such authority may apply to any justice having jurisdiction within their district in petty sessions assembled for an order to remedy the same," &c. Sect. 12 provides for the representation of riparian authorities at meetings of port sanitary authorities in case of ports containing more than one sanitary authority.

Cf. the Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c. 34*), ss. 99 and 121.

there have as yet been no decisions upon it in the Superior Courts, it is thought advisable to set it out at length.

“Whereas it is expedient to make further provision for
 “the prevention of the pollution of rivers, and in parti-
 “cular to prevent the establishment of new sources of
 “pollution :

Preamble.

“Be it therefore enacted by the Queen’s most excellent
 “Majesty, by and with the advice and consent of the lords
 “spiritual and temporal, and commons, in this present
 “Parliament assembled, and by the authority of the same,
 “as follows :

“1. This Act may be cited for all purposes as the Rivers
 “Pollution Prevention Act, 1876.

Short title of
 Act.

“PART I.—*Law as to Solid Matters.*

“2. Every person who puts or causes to be put or to
 “fall or knowingly permits to be put or to fall or to be
 “carried into any stream, so as either singly or in combi-
 “nation with other similar acts of the same or any other
 “person to interfere with its due flow, or to pollute its
 “waters, the solid refuse of any manufactory, manufac-
 “turing process or quarry, or any rubbish or cinders, or
 “any other waste or any putrid solid matter, shall be
 “deemed to have committed an offence against this Act.

Prohibition as
 to putting
 solid matters
 into streams.

“In proving interference with the due flow of any
 “stream, or in proving the pollution of any stream,
 “evidence may be given of repeated acts which together
 “cause such interference or pollution, although each act
 “taken by itself may not be sufficient for that purpose.

“PART II.—*Law as to Sewage Pollutions.*

“3. Every person who causes to fall or flow or know-
 “ingly permits to fall or flow or to be carried into any
 “stream any solid or liquid sewage matter, shall (subject
 “as in this Act mentioned) be deemed to have committed
 “an offence against this Act.

Prohibition as
 to drainage
 into streams
 of sewers.

“ Where any sewage matter falls or flows or is carried
 “ into any stream along a channel used, constructed, or in
 “ process of construction at the date of the passing of this
 “ Act for the purpose of conveying such sewage matter,
 “ the person causing or knowingly permitting the sewage
 “ matter so to fall or flow or to be carried shall not be
 “ deemed to have committed an offence against this Act
 “ if he shows to the satisfaction of the Court having cogni-
 “ sance of the case that he is using the best practicable and
 “ available means to render harmless the sewage matter so
 “ falling or flowing or carried into the stream.

“ Where the Local Government Board are satisfied after
 “ local inquiry that further time ought to be granted to
 “ any sanitary authority, which at the date of the passing
 “ of this Act is discharging sewage matter into any stream,
 “ or permitting it to be so discharged, by any such channel
 “ as aforesaid, for the purpose of enabling such authority
 “ to adopt the best practicable and available means for
 “ rendering harmless such sewage matter, the Local
 “ Government Board may by order declare that this sec-
 “ tion shall not, so far as regards the discharge of sewage
 “ matter by such channel be in operation until the expira-
 “ tion of a period to be limited in the order.

“ Any order made under this section may be from time
 “ to time renewed by the Local Government Board, subject
 “ to such conditions, if any, as they may see fit.

“ A person other than a sanitary authority shall not be
 “ guilty of an offence under this section in respect of the
 “ passing of sewage matter into a stream along a drain
 “ communicating with any sewer belonging to or under
 “ the control of any sanitary authority, provided he has
 “ the sanction of the sanitary authority for so doing.

“ PART III.—*Law as to Manufacturing and Mining Pollutions.*

Prohibition as
 to drainage
 into streams

“ 4. Every person who causes to fall or flow or know-
 “ ingly permits to fall or flow or to be carried into any

“ stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. from manufacturing factories.

“ Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act if he shows to the satisfaction of the Court having cognizance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream.

“ 5. Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine, shall be deemed to have committed an offence against this Act, unless in the case of poisonous, noxious, or polluting matter he shows to the satisfaction of the Court having cognizance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting matter so falling or flowing or carried into the stream. Prohibition as to drainage into stream from mines.

“ 6. Unless and until Parliament otherwise provides the following enactments shall take effect, proceedings shall not be taken against any person under this part of Restriction on proceedings under this part of the Act.

c.

N

“ this Act save by a sanitary authority, nor shall any such
“ proceedings be taken without the consent of the Local
“ Government Board: Provided always, that if the
“ sanitary authority, on the application of any person
“ interested alleging an offence to have been committed,
“ shall refuse to take proceedings or apply for the consent
“ by this section provided, the person so interested may
“ apply to the Local Government Board, and if that
“ Board on inquiry is of opinion that the sanitary autho-
“ rity should take proceedings, they may direct the
“ sanitary authority accordingly, who shall thereupon
“ commence proceedings.

“ The said Board in giving or withholding their con-
“ sent shall have regard to the industrial interests involved
“ in the case and to the circumstances and requirements of
“ the locality.

“ The said Board shall not give their consent to pro-
“ ceedings by the sanitary authority of any district which
“ is the seat of any manufacturing industry, unless they
“ are satisfied, after due inquiry, that means for rendering
“ harmless the poisonous, noxious, or polluting liquids
“ proceeding from the processes of such manufactures are
“ reasonably practicable and available under all the cir-
“ cumstances of the case, and that no material injury will
“ be inflicted by such proceedings on the interests of such
“ industry.

“ Any person within such district as aforesaid, against
“ whom proceedings are proposed to be taken under this
“ part of this Act, shall, notwithstanding any consent of
“ the Local Government Board, be at liberty to object
“ before the sanitary authority to such proceedings being
“ taken, and such authority shall, if required in writing
“ by such person, afford him an opportunity of being
“ heard against such proceedings being taken, so far as
“ the same relate to his works or manufacturing processes.
“ The sanitary authority shall thereupon allow such person
“ to be heard by himself, agents, and witnesses, and after

“ inquiry such authority shall determine, having regard
 “ to all the considerations to which the Local Government
 “ Board are by this section directed to have regard,
 “ whether such proceedings as aforesaid shall or shall not
 “ be taken ; and where any such sanitary authority has
 “ taken proceedings under this Act it shall not be com-
 “ petent to other sanitary authorities to take proceedings
 “ under this Act till the party against whom such proceed-
 “ ings are intended shall have failed in reasonable time to
 “ carry out the order of any competent Court under this
 “ Act.

“ PART IV.—*Administration of Law.*

“ 7. Every sanitary or other local authority having
 “ sewers under their control shall give facilities for
 “ enabling manufacturers within their district to carry the
 “ liquids proceeding from their factories or manufacturing
 “ processes into such sewers :

Sanitary
 authority to
 afford facili-
 ties for fac-
 tories drain-
 ing into
 sewers.

“ Provided that this section shall not extend to compel
 “ any sanitary or other local authority to admit into
 “ their sewers any liquid which would prejudicially affect
 “ such sewers or the disposal by sale, application to land,
 “ or otherwise, of the sewage matter conveyed along such
 “ sewers, or which would from its temperature or other-
 “ wise be injurious in a sanitary point of view :

“ Provided also, that no sanitary authority shall be re-
 “ quired to give such facilities as aforesaid where the
 “ sewers of such authority are only sufficient for the re-
 “ quirements of their district, nor where such facilities
 “ would interfere with any order of any Court of com-
 “ petent jurisdiction respecting the sewage of such
 “ authority.

“ 8. Every sanitary authority shall, subject to the
 “ restrictions in this Act contained, have power to enforce
 “ the provisions of this Act in relation to any stream being
 “ within or passing through or by any part of their
 “ district, and for that purpose to institute proceedings in
 “ respect of any offence against this Act which causes

Power of
 sanitary
 authority to
 enforce Act.

“interference with the due flow within their district of
 “any such stream, or the pollution within their district of
 “any such stream, against any other sanitary authority or
 “person, whether such offence is committed within or
 “without the district of the first-named sanitary authority.

“Any expenses incurred by a sanitary authority in the
 “execution of this Act shall be payable as if they were
 “expenses properly incurred by that authority in the
 “execution of the Public Health Act, 1875.

“Proceedings may also, subject to the restrictions in
 “this Act contained, be instituted in respect of any
 “offence against this Act by any person aggrieved by the
 “commission of such offence.

Power of Lee
 Conservancy
 Board to en-
 force Act.

“9. The Conservancy Board constituted under the Lee
 “Conservancy Act, 1868, shall, within the area of their
 “jurisdiction, have, to the exclusion of any other autho-
 “rity, the powers for enforcing the provisions of this Act
 “which sanitary authorities have under this Act.

“The said Conservancy Board may also enforce the
 “provisions of the Lee Conservancy Act, 1868, under the
 “head or division ‘Protection of Water,’ by application
 “to the county court having jurisdiction in the place in
 “which any offence is committed against those provisions,
 “and such court may by summary order require any
 “person to abstain from the commission of any such
 “offence, and the provisions of this Act with respect to
 “summary orders of county courts and appeal therefrom
 “shall apply accordingly.

LEGAL PROCEEDINGS. SAVING CLAUSES. DEFINITIONS.

“(1.) *Legal Proceedings.*

Offences to be
 restrained by
 summary
 order of
 county court.

“10. The county court having jurisdiction in the place
 “where any offence against this Act is committed may by
 “summary order require any person to abstain from the
 “commission of such offence, and where such offence
 “consists in default to perform a duty under this Act may
 “require him to perform such duty in manner in the said

“order specified; the court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the court seems meet. Previous to granting such order the court may, if it think fit, remit to skilled parties to report on the ‘best practicable and available means’ and the nature and cost of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report.

“Any person making default in complying with any requirement of an order of a County Court made in pursuance of this section shall pay to the person complaining, or such other person as the Court may direct, such sum, not exceeding fifty pounds a day for every day during which he is in default, as the Court may order; and such penalty shall be enforced in the same manner as any debt adjudged to be due by the Court; moreover, if any person so in default persists in disobeying any requirement of any such order for a period of not less than a month or such other period less than a month as may be prescribed by such order, the Court may in addition to any penalty it may impose appoint any person or persons to carry into effect such order, and all expenses incurred by any such person or persons to such amount as may be allowed by the County Court shall be deemed to be a debt due from the person in default to the person or persons executing such order, and may be recovered accordingly in the County Court.

“11. If either party in any proceedings before the County Court under this Act feels aggrieved by the decision of the Court in point of law or on the merits, or in respect of the admission or rejection of any evidence,

Appeal from county court, and removal of case into High Court of Justice.

“ he may appeal from that decision to the High Court of Justice.

“ The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and, if they cannot agree, to be settled by the judge of the County Court upon the application of the parties or their attorneys.

“ The Court of Appeal may draw any inferences from the facts stated in the case that a jury might draw from facts stated by witnesses.

“ Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in County Courts, and to enforcing judgments in County Courts and appeals from decisions of the County Court judges, and to the conditions of such appeals, and to the power of the superior Courts on such appeals, shall apply to all proceedings under this Act, and to an appeal from such action, in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the Court.

“ Any plaint entered in a County Court under this Act may be removed into the High Court of Justice by leave of any judge of the said High Court, if it appears to such judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice and not in a County Court, and on such terms as to security for and payment of costs, and such other terms (if any) as such judge may think fit.

Certificate of
inspector of
Local
Government
Board as to
best practicable means.

“ **12.** A certificate granted by an inspector of proper qualifications appointed for the purposes of this Act by the Local Government Board to the effect that the means used for rendering harmless any sewage matter or poisonous, noxious, or polluting solid or liquid matter falling or flowing or carried into any stream, are the best or only practicable and available means under the

“ circumstances of the particular case, shall in all courts
 “ and in all proceedings under this Act be conclusive
 “ evidence of the fact ; such certificate shall continue in
 “ force for a period to be named therein, not exceeding
 “ two years, and at the expiration of that period may be
 “ renewed for the like or any less period.

“ All expenses incurred in or about obtaining a certifi-
 “ cate under this section shall be paid by the applicant for
 “ the same.

“ Any person aggrieved by the grant or the withhold-
 “ ing of a certificate under this section may appeal to the
 “ Local Government Board against the decision of the
 “ inspector ; and the Board may either confirm, reverse,
 “ or modify his decision, and may make such order as to
 “ the party or parties by whom the costs of the appeal are
 “ to be borne as to the said Board may appear just.

“ **13.** Proceedings shall not be taken under this Act
 “ against any person for any offence against the pro-
 “ visions of Parts II. and III. of this Act until the
 “ expiration of twelve months after the passing of this
 “ Act ; nor shall proceedings in any case be taken under
 “ this Act for any offence against this Act until the
 “ expiration of two months after written notice of the
 “ intention to take such proceedings has been given to the
 “ offender, nor shall proceedings under this Act be taken
 “ for any offence against this Act while other proceedings
 “ in relation to such offence are pending.

Restriction on
proceedings
for offences.

“ **14.** The Local Government Board may make orders
 “ as to the costs incurred by them in relation to inquiries
 “ instituted by them under this Act, and as to the parties
 “ by whom such costs shall be borne ; and every such
 “ order and every order for the payment of costs made by
 “ the said Board under section twelve of this Act may be
 “ made a rule of her Majesty's High Court of Justice.

Orders as to
costs of in-
quiries.

“ **15.** Inspectors of the Local Government Board shall,
 “ for the purposes of any inquiry directed by the Board
 “ under this Act, have in relation to witnesses and their

Power of in-
spectors of
Local
Government
Board.

“ examination, the production of papers and accounts, and
 “ the inspection of places and matters required to be
 “ inspected, similar powers to those which the inspectors
 “ of the said Board have under the Public Health Act,
 “ 1875, for the purposes of that Act.

“ (2.) *Saving Clauses.*

Powers of
 Act cumulative.

“ **16.** The powers given by this Act shall not be
 “ deemed to prejudice or affect any other rights or powers
 “ now existing or vested in any person or persons by Act
 “ of Parliament, law, or custom, and such other rights or
 “ powers may be exercised in the same manner as if this
 “ Act had not passed; and nothing in this Act shall
 “ legalize any act or default which would but for this Act
 “ be deemed to be a nuisance or otherwise contrary to
 “ law: Provided nevertheless, that in any proceedings for
 “ enforcing against any person such rights or powers the
 “ Court before which such proceedings are pending shall
 “ take into consideration any certificate granted to such
 “ person under this Act.¹

Saving of
 rights of im-
 pound and
 diverting
 water.

Saving of
 certain Con-
 servancy
 Acts.

“ **17.** This Act shall not apply to or affect the lawful
 “ exercise of any rights of impounding or diverting water.

“ **18.** Nothing in or done under this Act shall extend
 “ to interfere with, take away, abridge, or prejudicially
 “ affect any right, power, authority, jurisdiction, or privi-
 “ lege given by ‘The Thames Conservancy Acts, 1857
 “ and 1864,’ or by ‘The Thames Navigation Act, 1866,’
 “ or by ‘The Lee Conservancy Act, 1868,’ or any Act or
 “ Acts extending or amending the said Acts or either of
 “ them, or affect any outfall or other works of the Metro-
 “ politan Board of Works (although beyond the Metro-
 “ polis) executed under the Metropolis Management Act,
 “ 1855, and the Acts amending or extending the same, or
 “ take away, abridge, or prejudicially affect any right,
 “ power, authority, jurisdiction, or privilege of the Metro-
 “ politan Board of Works.

¹ As to effect of this section on acquired rights of pollution, see *post*.

“ 19. Where any local authority or any urban or rural sanitary authority has been empowered or required by any Act of Parliament to carry any sewage into the sea or any tidal waters, nothing done by such authority in pursuance of such enactment, shall be deemed to be an offence against this Act.

Saving of works of certain local authorities.

“ (3.) *Definitions.*

“ 20. In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them ; that is to say,

Definitions.

“ ‘ Person ’ includes any body of persons, whether corporate or unincorporate :

“ ‘ Stream ’ includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the London Gazette. Save as aforesaid, it includes rivers, streams, canals, lakes, and watercourses, other than watercourses at the passing of this Act mainly used as sewers, and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid :

“ ‘ Solid matter ’ shall not include particles of matter in suspension in water :

“ ‘ Polluting ’ shall not include innocuous discoloration :

“ ‘ Sanitary authority ’ means—

“ In the metropolis as defined by the Metropolis Management Act, 1855, any local authority acting in the execution of the Nuisances Removal for England Act, 1855, and the Acts amending the same ;

“ Elsewhere in England, any urban or rural sanitary authority acting in the execution of the Public Health Act, 1875.

“PART V.—*Application of the Act to Scotland.*

Modifications
of Act in
Scotland.

“21. In the application of this Act to Scotland the following provisions shall have effect:

- “ (1.) The expression ‘sanitary authority’ shall mean
“ and include the local authority in any parish
“ or burgh in Scotland, acting under the Public
“ Health (Scotland) Act, 1867:
- “ (2.) The expression ‘London Gazette’ shall mean
“ Edinburgh Gazette:
- “ (3.) The expression ‘the Public Health Act, 1875,’
“ shall mean the Public Health (Scotland) Act,
“ 1867, and any Acts amending the same:
- “ (4.) This Act shall be read and construed as if for
“ the expression ‘the Local Government Board,’
“ wherever it occurs therein, the expression ‘the
“ Secretary of State’ were substituted; and the
“ expression ‘the Secretary of State’ shall mean
“ one of her Majesty’s Principal Secretaries of
“ State:
- “ (5.) The expression ‘the county court’ shall mean the
“ sheriff of the county, and shall include sheriff
“ substitute; and the expression ‘plaint entered
“ in a county court’ shall mean petition or com-
“ plaint presented in a sheriff court:
- “ (6.) The expression ‘the High Court of Justice’ shall
“ mean the Court of Session in either division of
“ the Inner House thereof:
- “ (7.) All the jurisdiction, powers, and authorities neces-
“ sary for the purposes of this Act are hereby
“ conferred on sheriffs and their substitutes:
- “ (8.) The Court of Session may, on the application of
“ the Lord Advocate, on behalf of the Secretary
“ of State, interpose their authority to any order
“ made by the Secretary of State as to the costs
“ incurred by him in relation to inquiries in-

“stituted by him under this Act, and as to the
 “parties by whom such costs shall be borne;
 “and may grant decree conform thereto, upon
 “which execution and diligence may proceed in
 “common form :

- “(9.) An inspector appointed for the purposes of this
 “Act by the Secretary of State shall, for the
 “purposes of any inquiry directed by the Secre-
 “tary of State under this Act, be entitled, by a
 “summons signed by him, to require the attend-
 “ance of all persons he may think fit to call
 “before him in regard to the matters of the
 “inquiry, and to administer oaths to, and exa-
 “mine upon oath, all such persons, and to
 “require and enforce the production upon oath
 “of all documents, accounts, or papers in any-
 “wise relating to such inquiry; and shall also
 “have, in relation to the inspection of places
 “and matters required to be inspected, similar
 “powers to those which sanitary inspectors have
 “under the Public Health (Scotland) Act, 1867.

“PART VI.

- “22. In the application of this Act to Ireland the following provisions shall have effect : Application
of this Act to
Ireland.
- “(1.) The expression ‘sanitary authority’ shall mean
 “any urban or rural sanitary authority acting
 “in the execution of ‘The Public Health (Ire-
 “land) Act, 1874 :’
- “(2.) The expression ‘The Public Health Act, 1875,’
 “shall mean ‘The Public Health (Ireland) Act,
 “1874 :’
- “(3.) The expression ‘the Local Government Board’
 “shall mean the Local Government Board for
 “Ireland :
- “(4.) The expression ‘the county court’ shall mean the
 “civil bill court :

- “(5.) The expression ‘plaint entered in a county court’
 “shall mean civil bill process:
- “(6.) The expression ‘the High Court of Justice’ shall
 “mean any of the superior Courts of common law
 “in Dublin, or any judge thereof to whom appeals
 “may be brought from the decision of a civil bill
 “Court:
- “(7.) The expression ‘the judge of the County Court’
 “shall mean the chairman of quarter sessions and
 “judge of the civil bill court:
- “(8.) The expression ‘the London Gazette’ shall mean
 “the Dublin Gazette:
- “(9.) All the jurisdiction, powers, and authorities neces-
 “sary for the purposes of this Act are hereby
 “conferred upon the civil bill courts and superior
 “courts, and the judges of the same respectively:
- “(10.) All penalties, when recovered by or on behalf
 “or at the instance of or in any proceeding insti-
 “tuted by any sanitary authority, or any officer of
 “such authority, shall be paid to such sanitary
 “authority, and by the same applied in aid of
 “their expenses under the Sanitary Acts; and save
 “as aforesaid all such penalties shall be applied in
 “manner directed by ‘The Fines Act (Ireland),
 “1851,’ and any Act amending the same.”

Percolating Water and Water having no defined Course.

Abstraction
 and diversion
 of, not action-
 able.

The principles of law which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to water which runs in no defined channel, or merely percolates through the strata, and no action will, therefore, lie for the abstraction or diversion of such water.¹

Right to

Thus in the case of *Rawstron v. Taylor*,² it has been

¹ As to pollution, see *post*, p. 199.

² 11 Ex. 353.

held that the owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual, and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land. So in *Broadbent v. Ramsbotham*,¹ where the plaintiff's mill for more than fifty years had been worked by the stream of a brook which was supplied by the water of a pond filled with rain, a shallow well supplied by subterraneous water, a swamp and a well formed by a stream springing out of the side of a hill, the waters of all of which occasionally overflowed and ran down the defendant's land in no definite channel into the brook; it was held that the plaintiff had no right as against the defendant to the natural flow of any of the waters. So in *Greatrex v. Hayward*,² it was held, following *Wood v. Waud*,³ that the flow of water from a drain made for agricultural purposes for twenty-one years does not give a right to the person, through whose land it flowed, to the continuance of the flow so as to preclude the proprietor of the land drained from altering the level of his drains for the improvement of his land, and so cutting off the supply.

The same rules of law have, after some difference of opinion, been established in a series of cases to apply to subterranean water percolating through the strata of the earth in no definite or known course. Where the course of a stream is definite and notorious, the same rules of law will govern it, whether it be above or below ground.⁴ In the case of *Acton v. Blundell*,⁵ it was decided that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner

drain surface water for agricultural purposes.

Subterranean water.

Wells.

Acton v. Blundell.

¹ 11 Ex. 602.

² 3 Ex. 291.

³ 3 Ex. 748.

⁴ *Chasemore v. Richards*, 7 H. L. 349; *Diekenon v. Grand Junction*

Canal, 7 Ex. 282; *Dudden v. Clutton Union*, 1 H. & N. 627, 630; *Wood v. Waud*, 3 Ex. 748; see *Phear*, p. 33; *Angell*, p. 152.

⁵ 12 M. & W. 324.

who, in carrying on mining operations in his own land in the usual manner, drains away water from the land of the first-mentioned owner and lays his well dry. "The question argued before us," says Tindal, C. J., delivering the judgment of the Court, "has been in substance this,—whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a watercourse flowing on the surface. In the case of a running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbour as he sends down to his neighbour below: he is neither better nor worse,—the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such a neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined. In the present case the nearest

“ coal pit is at a distance of half a mile from the well.
 “ It is obvious the law must equally apply if there is an
 “ interval of many miles. Considering, therefore, the state
 “ of circumstances upon which the law is grounded in the
 “ one case is entirely dissimilar from those which exist
 “ in the other, and that the application of the same rule
 “ to both would lead, in many cases, to consequences at
 “ once unreasonable and unjust, we feel ourselves war-
 “ ranted in holding upon principle that the case now
 “ under discussion does not fall within the rule which
 “ obtains as to surface streams, nor is it to be governed by
 “ analogy therewith.”

In *Dickenson v. The Grand Junction Canal*,¹ the Court of Exchequer held that an action would lie against a landowner for digging a well and so preventing subterraneous water from reaching a natural surface stream, which it would otherwise have reached; and this, whether the water was part of an underground watercourse, or would have reached the stream by percolating through the strata; but this opinion has been overruled by the decision of the House of Lords in *Chasemore v. Richards*.

*Dickenson v.
Grand Junction
Canal.*

In the case of *Acton v. Blundell*, just cited, the questions before the Court were two,—viz. whether a landowner by sinking a shaft on his own ground, first, might lawfully intercept water and prevent it from percolating into another landowner's well; or, secondly, might so actually abstract or withdraw water from the well. Tindal, C. J., decides both in the affirmative; for says he, “If in the
 “ exercise of such right he intercepts or drains off the
 “ water collected from underground springs in his neighbour's
 “ well, this inconvenience to his neighbour falls within
 “ the description of *damnum absque injuriâ*, which cannot
 “ become the ground of action.”

The first of these two propositions has been re-asserted in the case of *Chasemore v. Richards*² by the House of Lords, affirming the judgment of the Court of Exchequer

¹ 7 Ex. 282.

² 7 H. L. 349.

Long user
gives no fur-
ther right of
action.

Chamber. This case, moreover, decides a point not raised in *Acton v. Blundell*, viz., that a prescriptive right by long user to the water of the well or surface stream, with which the sinking of the shaft interfered, would give no further right of action.¹

Chasemore v.
Richards.

In *Chasemore v. Richards*,² the plaintiff, who owned an ancient mill on the river Wandle, and had for more than sixty years enjoyed the use of the stream, which was chiefly supplied by percolating and underground water, lost the use of the stream after an adjoining landowner had dug on his ground an extensive well, for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners. It was urged on behalf of the plaintiff, that, even granting that the defendant had a right to dig a well, and appropriate the water for the use of his own property, yet he had no right to such an unreasonable use of it, as to abstract it for the use of persons unconnected with his estates. This view seems to have been taken by Lord Wensleydale, but the other learned lords, Lords Chelmsford, Cranworth, Kingsdown, and Brougham, held that the plaintiff had no right of action: for, said Lord Chelmsford, "Before the plaintiff
" can question the act of the defendant, or discuss with
" him the reasonableness of the claim to appropriate this
" underground water for these purposes (whatever they
" may be), he must first establish his own right to have it
" pass freely to his mill, subject only to the qualified and
" restricted use of it to which each owner may be entitled,
" through whose land it may make its way. It seems to
" me that both principle and authority are opposed to
" such a right. The law as to water flowing in a certain
" and definite channel has been conclusively settled by a
" series of decisions, in which the whole subject has been
" very fully and satisfactorily considered, and the relative
" rights and duties of riparian proprietors have been care-
" fully adjusted and established. The principle of these

¹ See also per Maule, J., in *Smith v. Kenrick*, 7 C. B. 546. ² 7 H. L. 349.

“decisions appears to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a known subterranean channel; and I agree with the observation of Pollock, C. B., in *Dickenson v. Grand Junction Canal Co.*,¹ that, ‘If the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil, under which the stream flowed, could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground.’ But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which, in its natural state, is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods, or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land, through which the water filters, cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend? In this case the water, which ultimately finds its way

¹ 7 Ex. 300, 301.

“ to the River Wandle, is strained through the soil of
 “ several thousand acres—are the most distant landowners,
 “ as well as the adjacent ones, to be bound at their peril
 “ to take care to use their lands so as not to interrupt the
 “ oozing of the water through the soil, to a greater extent
 “ than shall be necessary for their own actual wants?
 “ For with Mr. Justice Coleridge I do not see here ‘ how
 “ the ignorance’ which the landowner has of the course
 “ of the springs below the surface, of the changes they
 “ undergo, and of the date of their commencement, ‘ is
 “ ‘ material in respect of a right which does not grow out
 “ ‘ of the assent or acquiescence of the landowner, as in
 “ ‘ the case of a servitude, but of the nature of the thing
 “ ‘ itself.’¹ This distinction between water flowing in a
 “ definite channel, and water, whether above or under-
 “ ground, not flowing in a stream at all, but either drain-
 “ ing off the surface of the land, or oozing through the
 “ underground soil in varying quantities, and in uncertain
 “ directions, depending on the variations of the atmosphere,
 “ appears to be well settled by the cases cited in argu-
 “ ment.” The learned lord goes on to cite *Broadbent v.*
Ramsbotham,² *Rawstron v. Taylor*,³ and *Acton v. Blundell*,⁴
 and continues: “ Against this concurrence of authority,
 “ what is there to be offered in favour of the plaintiff
 “ but the nisi prius case of *Balston v. Bensted*,⁵ and the
 “ case of *Dickenson v. Grand Junction Canal*?⁶ With
 “ respect to *Balston v. Bensted*, it does not appear that
 “ the question of the right to water percolating through
 “ the strata, as contradistinguished from water flowing
 “ in a visible stream, was ever presented to Lord Ellen-
 “ borough’s mind. With respect to the case of *Dickenson*
 “ v. *Grand Junction Canal*, upon which the plaintiff also
 “ relied, after the observations made upon it by Mr.
 “ Justice Cresswell in the Exchequer Chamber,⁷ and by
 “ Mr. Justice Wightman in delivering the opinion of the

¹ 2 H. & N. 191.

² 11 Ex. 602.

³ 11 Ex. 353.

⁴ 12 M. & W. 324.

⁵ 1 Camp. 463.

⁶ 7 Ex. 282.

⁷ 2 H. & N. 168.

“judges to this House,¹ it is unnecessary for me to say more, than that I entirely agree with them, and think that it can hardly be regarded as a satisfactory decision upon the point under consideration. It appears to me that reason and principle, as well as authority, are opposed to the claim of the plaintiff to maintain an action for the interception of the underground water, which would have ultimately found its way into the River Wandle; and that, therefore, the judgment of the Exchequer Chamber ought to be affirmed.”

Following this decision, it has been held in *Reg. v. Metropolitan Board of Works*,² that a landowner was not entitled to compensation under the *Metropolitan Sewers Act* (11 & 12 *Vict. c. 112*), for the abstraction of water from underground springs, which rose in his lands and fed his ponds, by a sewer made under the provisions of the Act, in neighbouring lands.

The judgment of the Court was founded on the principle that where compensation is given for damages done from works authorized by an Act of Parliament, such compensation can only be claimed where the damage would have been ground of action if arising from the act of a private individual, and that as the abstraction of underground percolating water was not actionable, compensation could not be claimed. Cockburn, C. J., dissented from this judgment on the ground that under the 50th section of the Act, which provided that compensation should be given “where any work shall interfere with or prejudicially affect any ancient mill or any right connected therewith, or other right to the use of water,” the plaintiff was entitled to compensation; for though he might have no legal right to the water till it had risen into the pond, the defendants by preventing the water from rising and becoming the subject of legal right, had prejudicially affected the plaintiff’s right to it.

¹ 7 H. L. 369.

² 3 B. & S. 710; 9 Jur., N. S. 1008; 32 L. J., Q. B. 105.

So in *Brain v. Mayfell*,¹ where defendant sold to plaintiff a well, and the right of conveying water therefrom through defendant's land without interruption or disturbance; the Court of Appeal held that defendant had only conveyed the flow of the water after it had risen in the well, and that no action would lie for the interception of percolating water before it reached the well.

In a late case in the Privy Council,² it has been held that where a landowner has granted the surface to another, retaining the mines beneath it, the mine-owner is not responsible in the absence of express agreement,³ if in working the mines he drains the water from the surface.

Abstraction
of water
actually
in a well.

It has, moreover, been decided that where water which has actually percolated into, and is in a well, has been abstracted by operations in the adjoining land, no action will lie. Thus, in the *New River Co. v. Johnson*,⁴ where a well of the respondent was drained by a sewer constructed by the appellants under a local Act incorporating the *Waterworks Clauses Act*, 10 & 11 *Vict. c. 17*, the Court of Queen's Bench held that as on the authority of *Acton v. Blundell*,⁵ and *Chasemore v. Richards*,⁶ no action would have lain for what was done, the statute gave the respondent no right to compensation. Crompton, J., says, "The
" only matter about which there could reasonably be any
" doubt is whether, but for the Act of Parliament giving
" the appellants power to construct their works, the respon-
" dent would have had a good cause of action against them
" for abstracting from the well water which had already
" percolated into it. Had this been a case of water run-
" ning in a defined stream, I should have been sorry to
" give a positive opinion that the abstraction of it might
" not have afforded her a cause of action. There may be
" some distinction between such a case and the present

¹ 41 L. T., N. S. 455.

² *Ballacorkish Co. v. Harrison*,
L. R., 5 P. C. 49.

³ As to effect of express agree-

ment, see *post*, p. 209 *et seq.*

⁴ 2 E. & E. 435.

⁵ 12 M. & W. 324.

⁶ 7 H. L. 349.

“ one, of water merely percolating ; as to which *Acton v. Blundell*¹ shows conclusively that no action will lie, and that the only remedy of the owner of a well, from which such water has been abstracted, is to sink the well deeper. That is a decision of the Court of Exchequer Chamber of great authority ; and the case of *Dickenson v. Grand Junction Canal*, in the Court of Exchequer,² not only does not and could not overrule it, but is itself virtually overruled by the judgment of the House of Lords in *Chasemore v. Richards*,³ in which *Acton v. Blundell*¹ is approved and acted upon.”

In conformity with the doubt expressed by Crompton, J., it has been held by Lord Hatherley, L. C., in *Grand Junction Canal v. Shugar*,⁴ that although a landowner will not, in general, be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off water flowing in a defined surface channel through the adjoining land. Lord Hatherley says, “ The point most closely pressed on me by Mr. Eddis and Mr. Lindley was this—how can you distinguish the case of a well where the water has been secured, from the case of running water ? That is answered at once by the decision in the case of *Chasemore v. Richards*, and the distinction is plain. If you are simply using what you have a right to use, and leaving your neighbour to use the rest of the water as it flows on, you are entitled to do so ; but you must not appropriate that which you have no right to appropriate yourself. In this case there is, *ex concessis*, a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the local board have made. As far as regards the support of the water, all one can say is this : I do not think *Chasemore v. Richards*, or any other case, has decided more than this, that you have a right to all

Actually in a defined surface channel.

¹ 12 M. & W. 324.

³ 7 H. L. 349.

² 7 Ex. 282.

⁴ L. R., 6 Ch. 483.

“ the water which you can draw from the different sources
 “ which may percolate underground; but that has no
 “ bearing at all on what you may do with regard to water
 “ which is in a defined channel, and which you are not to
 “ touch. If you cannot get at the underground water
 “ without touching the water in a defined channel, I think
 “ you cannot get at it at all. You are not by your
 “ operations, or by any act of yours, to diminish the water
 “ which runs in this defined channel, because that is not
 “ only for yourself, but for your neighbours also, who
 “ have a clear right to use it, and have it come to them
 “ unimpaired in quality and undiminished in quantity.”¹

Support from
 subterranean
 water.

An owner of land has, on the same principle as governs the foregoing cases, no right at common law to the support of subterranean water.

In *Popplewell v. Hodgkinson*,² the owner of land granted to him for building purposes, subject to a chief rent, granted a portion of it to the plaintiff, subject to a similar rent, and subsequently granted the remaining adjoining portion to certain trustees for erecting a church. The defendant, a builder employed by the trustees, by necessary excavations drained the land of the plaintiff, so that the soil subsided, and certain cottages thereon became thereby cracked and damaged. The Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the plaintiff had no right of action. Cockburn, C. J., says, delivering the judgment of the Court: “ Although
 “ there is no doubt that a man has no right to withdraw
 “ from his neighbour the support of adjacent soil, there is
 “ nothing at common law to prevent his draining the soil,
 “ if for any reason it becomes necessary or convenient for
 “ him to do so. It may be, indeed, that where one grants

¹ As to rights and liabilities of mine owners with regard to water, see *ante*, p. 128 *et seq.*; and as to canals, see *Stourbridge Canal v. Dudley*, 30 L. J., Q. B. 108; *Dudley Canal v. Grazebrook*, 1 B. & A. 59; *Cromford Canal v. Cutts*, 5

R. C. 442; *Birmingham Canal v. Dudley*, 7 H. & N. 989; *Dunn v. Birmingham*, L. R., 8 Q. B. 42; and *post*, Ch. V.

² L. R., 4 Ex. 248; 38 L. J., Ex. 126; 17 W. R. 806 (Ex. Ch.).

“land to another for some special purpose,—for building purposes, for example,—then, since according to the old maxim a man cannot derogate from his own grant, the grantor could not do anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been.” His lordship goes on to say that there was nothing in the present case from which an implied condition could be inferred to prevent the defendant using his land in the ordinary manner.

So in *Elliot v. N. E. Rail. Co.*,¹ it has been held by the House of Lords that, where the owner of an accidentally drowned mine sold land to a railway company for the purpose of building a bridge under an Act of Parliament, reserving to him the right to work the minerals, provided no damage was done thereby to the railway, and the land sold derived additional support from the water in the mine, the railway company was not entitled to an injunction to restrain the mine owner from draining the mine in the ordinary way, and restoring it to a working condition, although the mine had been in a drowned state and abandoned for forty years.

Although no action will lie for the diversion or abstraction of percolating water, the law is otherwise with regard to its pollution. The principle on which this distinction rests is expressed by the maxim, “*Sic utere tuo ut alienum non lædas.*”

Pollution of
percolating
water.

In the case of *Hodgkinson v. Ennor*,² the plaintiff owned a mill, and proved an immemorial right to the pure flow of a stream from a natural cavern into which rain water ran by underground passages. The defendant, the owner of land on a hill above the cavern, and in the process of lead working, discharged polluted water from pits through

¹ 10 H. L. Cas. 333; 29 L. J., Ch. 308. See also *Earl Ripon v. Hobart*, 3 Myl. & K. 169; *Dudley Canal v. Grazebrook*, 1 B. & A. 59; *Stourbridge Canal v. Dudley*, 30 L.

J., Q. B. 108; *Birmingham Canal v. Dudley*, 7 H. & N. 969; *Birmingham Canal v. Swindell*, 7 H. & N. 980, n.

² 4 B. & S. 229.

drains and natural rents in the rock into the aforesaid cavern. It was argued for defendant that he had a right to work his mines in the ordinary way, and that, on the authority of *Chasemore v. Richards*, no action would lie for any interference with underground percolating water; at least, unless an indictable nuisance was created. The Court of Queen's Bench held, however, that the plaintiff had a cause of action. Cockburn, C. J., says: "In *Chasemore v. Richards*,¹ it was decided that, until water rises to the surface of the land, the law gives no right of action to a party who has suffered by its abstraction. But in the present case, the right of the plaintiff cannot be disputed, for it is found that he and those whom he represents have always had a right to have the water in question flow in its accustomed course and purity. Then, by the act of the defendant, the water has been polluted and fouled; which being once an ascertained fact, it makes no difference that, by the manner in which the defendant discharges the polluted water from his works, it goes over the surface of the buddles, from whence it flows a certain distance over the limestone formation, before it arrives at the plaintiff's watercourse. It is clear, in point of law, equity, and justice, that the plaintiff has a cause of action." Blackburn, J.: "I take the law to be as stated in *Tenant v. Goldwin*,² that you must not injure the property of your neighbour, and that, consequently, if filth is created on any man's land, then, in the quaint language of the *Report in Salk*. 361, 'he whose dirt it is, must keep it that it may not trespass.'"

So, in *Womersley v. Church*,³ Lord Romilly, M. R., granted an injunction to restrain the defendant from deepening his cesspool, so as to cause polluting matter to percolate through the soil, and foul the plaintiff's well. The cases of *Magor v. Chadwick*,⁴ and *Wood v. Waud*,⁵ also

¹ 7 H. L. 349.

⁴ 11 A. & E. 571.

² 2 Ld. Raym. 1089; Salk. 21, 360; 6 Mod. 311; Holt, 500.

⁵ 3 Ex. 748. See also *Sutcliffe v. Booth*, 32 L. J., Q. B. 136.

³ 17 L. T., N. S. 190.

draw distinction between the right to divert and the right to pollute water arising from temporary causes. "The Court of Queen's Bench," says Pollock, C. B., delivering the judgment of the Court in the latter case, "in the subsequent case of *Magor v. Chadwick*, supported a verdict for the plaintiff for the disturbance of a stream, under circumstances somewhat similar; but in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor anyone claiming under him, and he had not put an end to it by altering the mode of working his mines; but what is more important, the action was not brought for abstracting, but for fouling—a species of injury which does not stand on the same footing; for, although the possessor of the mine might stop the stream, it does not follow that he or any other could pollute it whilst it continued to run."¹

¹ As to pollution of artificial watercourses, see *ante*, p. 154 *et seq.*

CHAPTER IV.

OF ACQUIRED RIGHTS OF WATER, AND THE EASEMENT
OF WATERCOURSE.

Acquired
rights of
water termed
easements.

IN addition to the natural right to receive flowing water in its accustomed course, rights, the object of which is to interfere with the natural course of the stream, may be acquired over a stream flowing through a man's land or through his neighbour's land. Thus a right may be acquired to throw back upon the land of proprietors higher up the stream the water which, unless so reflected, would by the force of gravity pass from it; or to discharge the water upon the land lying lower down the stream either injured in quality, or with a degree of force greater or less than the natural current.¹

Such acquired rights are termed *easements*.

Definition of
easement.

An easement may be defined as a service or convenience which one neighbour hath, without profit upon, over, or from any land or water of another.²

An *easement* (under which head all acquired rights of water are classed) differs from a *profit à prendre*, in that the former is merely a right to do some act which, if done without such right, would be a simple trespass on another's property, while a *profit à prendre* carries with it a right to take and appropriate a portion of the soil and its produce.³

Easements must be used in connection with some tene-

¹ Gale on Easements, p. 270; *Sampson v. Hoddinot*, 1 C. B., N. S. 611.

² Co. Litt. 19, 20; see also Angell on Watercourses, p. 244; *Hewlins v. Shippam*, 5 B. & C. 221;

Manning v. Wasdale, 5 A. & E. 764; *Race v. Ward*, 4 E. & B. 702.

³ Phear, Rights of Water, p. 57; *Race v. Ward*, 4 E. & B. 702; *Manning v. Wasdale*, 5 A. & E. 764.

ment, and cannot, as hereditaments, be created or acquired in gross.¹

The tenement in respect of which an easement is used is termed the *dominant* tenement; and the tenement upon, over, or from which it is used is termed the *servient* tenement. Considered with reference to the servient tenement, an easement is frequently termed a *servitude*.

The easements relating to water may be classified thus:²— Easements of water.

1. The right to affect or use the water of a natural stream in any manner not justified by natural right—

- (a) In quantity;
- (b) In quality.

2. The right to conduct water across a neighbour's land by an artificial watercourse, and to go on his land for the purposes of clearing it.

3. The right to discharge water or other matter on a neighbour's land.

4. The right to go on a neighbour's land to draw water from a well.

It is proposed to consider, first, how these easements may be acquired; and, secondly, the nature, extent, and mode of enjoyment of the above-mentioned particular,—easements of water.

Easements of Water, how acquired.

The origin of rights of this kind is referred either to express contract between the parties, or to a similar contract implied from the peculiar relation of the parties at the time they became possessed of their respective tenements, or from the long-continued exercise of the right from which a previous contract between them may be

¹ *Ackroyd v. Smith*, 10 C. B. 164; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 637; *Hill v. Tupper*, 2 H. & C. 121; and see also remarks on the last case by Bram-

well, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 11.

² The acquired rights of fishery and navigation are fully treated of elsewhere; see Chaps. VI. and VII.

inferred;¹ or to the provisions of an Act of the legislature.²

An easement is an incorporeal right.

“A watercourse,” says Woolrych,³ “may be either a real or an incorporeal hereditament. If by grant, prescription, or otherwise, one should have an easement of this kind in the land of another person, it would partake of the latter quality; but if the water flow over the party’s own land, although, indeed, it cannot be claimed as water, yet it is, in effect, identified with the realty, because it passes over the soil, and *cujus est solum, ejus est usque ad cælum*.”

By express agreement.

The ceremony required by law for the creation of easements and all other incorporeal hereditaments, is a deed, devise, or record; and as the same ceremonies are requisite in the transfer of a right as are requisite in its original formation, a water right as an incorporeal hereditament can only be assigned by deed, devise, or record.⁴

An easement can only be created or assigned at law by deed.

This point was decided in *Hewlins v. Shippam*,⁵ where the question was, whether a right to a drain running through the adjoining land could be conferred by a parol licence, and under the Statute of Frauds; and the Court held that such an interest could only be created by deed.

Bayley, J., in delivering judgment of Court, says: “A right of way or a right of passage for water (where it does not create an interest in land), is an incorporeal right, and stands on the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest *may, which I think it cannot*), otherwise than by deed.”⁶

¹ Gale on Easements, p. 3.

² Per Cockburn, C. J., in *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 537.

³ Woolrych, p. 146.

⁴ Angell on Watercourses, p. 324; Gale on Easements, p. 27.

⁵ 5 B. & C. 221; see as to this subject, Gale on Easements, pp.

27—83.

⁶ *Hewlins v. Shippam*, 5 B. & C. 221; see also *Fentiman v. Smith*, 4 East, 107; see also *Corker v. Payne*, 18 W. R. 436; *Cocker v. Cowper*, 1 C. M. & R. 418; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; Gale, pp. 29, 53.

After citing other cases¹ in support of his opinion, the learned judge continues: "And in *Fentiman v. Smith*,² " where the plaintiff claimed to have passage for water by " a tunnel over defendant's land, Lord Ellenborough lays " it down distinctly—"The title to have the water flowing " " in the tunnel over defendant's land could not pass by " " parol licence without deed." Upon these authorities, " we are of opinion, that, although a parol licence might " be an excuse for a trespass till such licence were coun- " termanded, that a *right and title* to have passage for " water, for a freehold interest, required a deed to create " it; and that, as there has been no deed in this case, the " present action, which is founded on a right and title, " cannot be supported."³

The doctrine laid down in this case was fully recognized in *Cocker v. Couper*,⁴ where an action was brought for stopping a watercourse. It appears from the award of the arbitrator that the channel in question consisted of a drain and tunnel which had been constructed in defendant's land by the plaintiff with the verbal consent of the then tenant and the defendant, and that the water had flowed through it up to the year 1833, when upon plaintiff's refusal to pay for the use of the water the defendant diverted the channel. The Court of Exchequer were clearly of the opinion that the plaintiff was not entitled to recover. " With regard to the question of licence," says the Court, " the case of *Hewlins v. Shippam* is decisive to show that " an easement like this cannot be conferred unless by

¹ Co. Litt. 9a, 42a, 169; 2 Roll. Abr. 62; Shep. Touch. 231; *Monk v. Butler*, Cro. Jac. 574; *Rumsey v. Rawson*, 1 Vent. 18—25; *Hoskins v. Robins*, 1 Vent. 123—163; *Harrison v. Parker*, 6 East, 154.

² 4 East, 107.

³ See also the remarks of the learned judge on the cases of *Winter v. Brockwell*, 8 East, 309; *Webb v. Paternoster*, Palm. 71; *Wood v.*

Lake, Sayer, 3; and *Taylor v. Waters*, 7 Taunt. 374.

⁴ 1 C. M. & R. 418; see also *Wood v. Leadbitter*, 13 M. & W. 838; *Wood v. Manley*, 11 A. & E. 30; *Bird v. Higginson*, 6 A. & E. 824; *Perry v. Fitzhove*, 8 Q. B. 757; *Bryan v. Whistler*, 8 B. & C. 288; *Brown v. Windsor*, 1 Cr. & J. 20; *Wallis v. Harrison*, 4 M. & W. 538.

“ deed.” With regard to the effect of a licence, Mr. Phear¹ thus expresses himself. “ It is very important in considering the subject of easements to distinguish as early as possible between a *right*² to do an act *in alieno solo* and a licence to commit an act of trespass. The *right* involves a certain continuing element, and has an incorporeal existence, whether any act be done under it or not: the possessor of the land over which it extends is, so far as it is capable of being exercised, deprived of an incident of territorial property, and the possessor of the right acquires by it, just to the same extent, an interest in the land itself. Whether the possessor of a right avails himself of it or not, he is entitled, while it continues, to treat it as something having an abstract existence, and to protect it from any infringement—*i. e.* from anything, the effect of which would be to prevent his free exercise of it when he chose. On the other hand a licence³ merely excuses the act when done, is retrospective and not prospective in its operation; it begets no obligation on the part of the licensor to keep it in force, and may, therefore, be revoked by him at any moment.”

Equitable
doctrine of
acquiescence.

Where, however, the owner of a servient tenement has by express consent, or by such acquiescence as would make it a fraud to insist upon the legal right, induced others to incur expense in the execution of permanent works or the like, the High Court of Justice,⁴ administering equity, will, in many cases, restrain him from the benefit of this rule. “ The Court,” says Lord Eldon,⁵

¹ Page 58.

² See judgment of Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. 232.

³ Brooke's Abridg. title “ Licence;” Shep. Touch. 239; *Wood v. Leadbitter*, 13 M. & W. 842.

⁴ See 36 & 37 Vict. c. 66, s. 24.

⁵ *Dann v. Spurrer*, 7 Ves. 235;

Ramsden v. Dyson, L. R., 1 H. L. 140; *Watercourse case*, 2 Eq. Abr. 522, pl. 3; *Short v. Tayler*, cited *ibid.*; *Powell v. Thomas*, 6 Hare, 300; *Laird v. Birkenhead*, 1 John. 500; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91; *Somerset Canal v. Harcourt*, 24 Beav. 271;

“ will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title (and the circumstance of looking on is in many cases as strong as using terms of encouragement)—a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive that he would not have done, but upon an expectation that the lessor would not have thrown any obstacle in the way of the enjoyment.” Thus in *Duke of Devonshire v. Eglin*,¹ where expense had been incurred in constructing a watercourse through defendant’s lands, with his consent, but without any grant under seal, and after a user of nine years defendant attempted to interfere, he was restrained, upon terms, by perpetual injunction from interfering with the further user of the watercourse.

So where a licence to take water which is essential to the enjoyment of property is acted upon, and expense incurred to the knowledge of the licensor, the Courts will grant relief. In *Bankart v. Tennant*,² the defendant, being the owner of a canal of which plaintiffs were customers, gave the plaintiffs to understand that as long as they were customers they should have the use of the waste water of the canal for certain furnaces and smelting works which they had erected on the banks. James, V.-C., held that this did not give them any equitable right to the water; though he said that if it had been made out to his satisfaction that the water was essential, or anything like essential, to the enjoyment of the plaintiffs’ property, he should have found his way of giving them the relief they asked. He cited in his judgment what Lord Loughborough says in *Clavering’s case*:³ “There was a case (I do

Rochdale Canal v. King, 2 Sim. N. S. 28; *Cotching v. Bassett*, 32 Beav. 101.

¹ 14 Beav. 530. As to what acquiescence is not sufficient, see *Blanchard v. Bridges*, 4 A. & E.

194; *Bankart v. Houghton*, 27 Beav. 425; *Bankart v. Tennant*, L. R., 10 Eq. 141.

² L. R., 10 Eq. 141.

³ 5 Vesey, 590.

“ not know whether it came to a decree) against Mr. George Clavering, in which some person was carrying on the project of a colliery, and had sunk a shaft at considerable expense. Mr. Clavering saw the thing going on; and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground; and when the work was begun he said he would not give the road. The end of it was that he was made sensible,—I do not know whether by decree or not,—and that he was made to give the road at a fair value.”¹

“Notwithstanding this provision,” says the editor of *Gale*, “the distinction between law and equity must still be regarded. If a legal estate in an easement is granted by deed, the consideration is immaterial. A claim for damages may be founded for breach of an agreement to grant an easement, if there is any consideration for the agreement; but to claim an equitable estate in an easement by agreement not under seal, there must be a substantial consideration at least equal in value to the easement claimed, according to the maxim ‘Equity is equality.’”

Parol licence may work the extinguishment of an easement.

A parol licence has, moreover, been held to be sufficient to extinguish an existing easement, as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it. Thus, in *Liggins v. Inge*,² it appeared that the predecessor of the plaintiff, who was entitled to a flow of water to his mill over defendant's land, by a parol licence authorized the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working of plaintiff's mill; subsequently the plaintiff complained to the defendants of the

¹ *Davies v. Sear*, L. R., 7 Eq. 427; see also *Bankart v. Houghton*, 27 Beav. 425; *Blanchard v. Bridges*, 4 A. & E. 194; *Lady Stanley of*

Alderley v. Earl of Shrewsbury, 10 W. N. 71.

² 7 Bing. 693.

injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir; and upon refusal on the part of defendants to do this, an action was brought. The Court held, on the authority of *Winter v. Brockwell*,¹ and *Hewlins v. Shippam*,² that the licence was irrevocable. In the judgment of Bayley, J., in *Hewlins v. Shippam*,² the learned judge, in referring to the case of *Winter v. Brockwell*, says, "The case of *Winter v. Brockwell*, which was relied upon on the part of the plaintiff, appears clearly distinguishable from the present. All that the defendant there did, he did upon his own land. He claimed no right or easement on the plaintiff's. The plaintiff claimed a right or easement against him, viz.:—the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through the defendant's area; and the only point decided was, that as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to incur expenses in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised on the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it."

Such a licence, moreover, coupled with the absence of interference by the licensor with the execution of the works licensed, proves an intention to abandon the easement, which, if communicated to and acted on by the servient owner, is, of itself, sufficient in some cases to extinguish an easement.³

An easement may be granted either separately and apart from the dominant tenement, or it may be included

Construction and effect of express grant of an easement.

¹ 8 East, 308.

² 5 B. & C. 221, and *ante*, p. 204.

³ See Gale on Easements, p. 29;

see also Angell on Watercourses, pp. 483—510, and American cases therein cited.

in the conveyance of it, by the use of such words as "all waters and watercourses used, occupied, or enjoyed with the premises." Where the easement is granted *per se*, the precise words of the instrument itself must determine the extent of the right created.¹ "I think," says Jessel, M. R.,² "that the true rule of construction is to construe the language of the instrument according to its ordinary meaning, giving to technical terms their technical meaning, unless we find a context such as to convince the mind that the ordinary rules of construction, which would be applied to the original expressions standing alone, ought not to be applied A grant of a watercourse in law, especially when coupled with other words, may mean any one of three things. It may mean the easement, or the right to the running of water; it may mean the channel pipe or drain which contains the water, and it may mean the land over which the water flows. Which it does mean must be shown by the context, and, if there is no context, I apprehend that it would not mean anything but the easement,—a right to the flow of water."³

*Tayler v.
St. Helens.*

In the above case, a landowner granted to a company all the watercourses, dams, and reservoirs upon certain lands of his, which watercourses, &c. were laid down on an annexed plan, which was to be taken as part of the deed; and also the several streams and springs of water flowing into or feeding the said watercourses, &c., with right for the company solely to take and use the water from the said springs or streams of water, watercourses, &c., with powers to cleanse and repair, and with all other powers requisite for the enjoyment of the premises granted. The grantor was to be at liberty to use the waste or overflow

¹ Gale, p. 34.

² *Tayler v. St. Helens*, 6 Ch. D. 264; see also *Watts v. Kelson*, L. R., 6 Ch. 166; *Wardle v. Brocklehurst*, 1 E. & E. 1058; *Northam v. Hurley*, 1 E. & B. 665; *Blatchford*

v. Mayor of Plymouth, 3 Bing. N. C. 691; *Chadwick v. Marsden*, L. R., 2 Ex. 285.

³ See per Bramwell, L. J., in *Brain v. Marfell*, 41 L. T., N. S. 457.

water from the dams and reservoirs, but was not to exercise this power if the company resolved that it would be injurious to them. Certain portions of the watercourse noted on the plan might be enlarged to a certain extent. The watercourse, it appeared, was large enough to carry off all the water which flowed into it, except after heavy rain; but at one point there was a contraction of the channel, which, after heavy rain, backed up the water and caused a considerable overflow, of which overflow the grantor had the benefit for many years. The grantees, having occasion for more water, removed the obstruction, so as to allow the whole of the water which came into the watercourse during heavy rains to run down to their reservoir. The Court of Appeal held, that the grant was a grant of the artificial channel, of the definite springs and streams on the land, and of such water as should find its way into and run down the channel *as it stood*, and not a grant of all the waters on the land, and that the grantees had no right to alter the levels, or to enlarge the channel, so as to enable it to carry off all the water in times of heavy rains.¹

In *Chadwick v. Marsden*,² the reservation of the free running of water and soil, coming from any other building and lands contiguous to the premises demised in and through the sewers and watercourses, made or to be made within, through, or under the said premises, was held to entitle the grantor to the passage of all water lawfully on his land, though it did not arise there, and to such products of the ordinary use of the land for habitation, such as night soil and sewage, but not to entitle him to send through the drain the offensive refuse of a manufactory. *Chadwick v. Marsden.*

In *Brain v. Marfell*,³ the respondent, Marfell, conveyed to the appellant, Brain, a well or spring, and the sole right to the water therein and obtainable therefrom and the *Brain v. Marfell.*

¹ See also *Northam v. Hurley*, 1 E. & B. 665. *Pyer v. Carter*, 1 H. & N. 916; 26 L. J., Ex. 258.

² L. R., 2 Ex. 285; see also ³ 41 L. T., N. S. 455 (C. A.).

right and liberty to convey the said waste to his dwelling-house, and agreed that Brain, his heirs and assigns, should be for ever absolutely entitled to the said well or spring of water, and enjoy the same without interruption or disturbance by him, Marfell, or his heirs, assigns, or any other person or persons whomsoever. A railway company purchased from respondent lands in the proximity of the spring, without recourse to their compulsory powers. The works of the railway company drained the water from the land before it reached the spring, in consequence whereof the spring became dry, and no water flowed through the appellant's pipes. On an action for breach of agreement, the Court of Appeal held, affirming the judgment of Pollock, B., that the respondent had only conveyed the flow of the water after it had reached the spring, and that, therefore, the draining of the water before it reached the spring was no breach.

*Rawstron v.
Taylor.*

In the case of *Rawstron v. Taylor*,¹ it appeared that for twenty years and more water had flowed through an old drain on defendant's land, and along an ancient watercourse, and thence along a close of the defendant called G. B., and had thence contributed to supply plaintiff's mills after their erection in 1845. In that year defendant by deed conveyed to plaintiff the close G. B., together with all ways, watercourses, privileges, rights, members, and appurtenances to the same close belonging or appertaining, subject to the proviso that it should be lawful for the defendant to use for any manufacturing, domestic or agricultural purposes, any water flowing from or through the contiguous lands of defendant unto and into the close of G. B., returning the surplus, or so much as remained, after being used for the aforesaid purposes, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close G. B. The defendant erected a lock-up tank upon his land, and caused the water which arose in his

¹ 11 Ex. 369.

land near to the close G. B., and which had previously been accustomed to flow along the old drain and ancient watercourse into the close G. B.; and he caused the water to be conveyed from the tank to a lower part of his land to be used by his tenants. This water was used by them for the purposes mentioned in the proviso, but the surplus could not be returned to the close G. B. It was held, that by the deed the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso; and that by locking it up he had diverted it, and was liable to an action for breach of covenant by reason of such diversion.¹

In *Whitehead v. Parks*,² a grant of all streams of water that may be found in certain closes (when at the time of the grant there was but one stream and several wells), was held to include the underground water in the land, so as to prevent the grantor, or any one claiming under him, from doing anything, the effect of which would be to drain such underground water from the land. Pollock, C. B., says, "In the case of *Northam v. Hurley*, it was settled that where rights to water are created under a deed, the Court cannot take into consideration the rights which the parties would have had as riparian proprietors or otherwise; but the nature and extent of their interest must be regulated wholly by the deed."²

Where a local Act of Parliament authorized a company to enter upon lands in a manor and search for any spring of water, and to convey the water from such spring into the town of South Shields, and it was provided that the company should not take water from any spring, streams or ponds, so as to deprive the occupiers of the land of water for their own necessary uses, but that the company might lay down pipes and the inhabitants might, with consent of the company, obtain water by pipes to communicate with the company's pipes at certain charges,

Whitehead v. Parks.

South Shields Water Co. v. Cookson.

¹ See *Northam v. Hurley*, 1 E. & B. 665. ² 2 H. & N. 870.

according to the bore of the pipes; it was held that the owners and occupiers of lands within the manor were not prevented by the Act of Parliament from sinking wells in such lands, though the effect might be to draw off water from the company's springs.¹

Benefits of
the right to
an easement
runs with the
land.

Upon a grant or covenant conferring an easement, the successive owners of the dominant estate, who, in the case of an ordinary covenant, would at common law be strangers to the contract, become entitled to the benefits of the rights conferred, and may sue for a violation of them.²

Thus in the case of *Cooke v. Chilcote*,³ where a purchaser of land with a well or spring on it covenanted with the vendor, who retained land adjoining, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land; it was held that both the benefit and burthen of the covenant ran with the land, and that consequently the plaintiff, who had purchased part of the land retained by the vendor, was entitled to an injunction to restrain the defendant, who had purchased the land of the original purchaser, from allowing the pump and reservoir to remain uncompleted. It was further held, that even if the covenant did not run with the land, yet a sub-purchaser with notice of the covenant was bound by it.⁴

Not so rights
unconnected
with land.

The grant, however, of a right not appurtenant to land operates only as a personal licence, and is not assignable,—it confers no right in the land to the grantee, but operates only as a contract between the grantor and the grantee. Thus where a canal company granted by deed the sole and exclusive right and liberty of putting pleasure boats on a canal, it was held that the grant did not create such an estate in the plaintiff as to enable him to main-

¹ *South Shields Water Co. v. Cookson*, 15 L. J., N. S., Ex. 315; see per Lord Eldon in *Blakemore v. Glamorgan*, 1 Myl. & K. 162, as to effect of local Acts of Parliament.

² Gale on Easements, p. 85.

³ 3 Ch. D. 694; see *Spencer's case*, 5 Rep. 16a; 1 Smith's L. C. 60.

⁴ As to the effect of notice with regard to lights, see *Allen v. Lockham*, 11 Ch. Div. 790.

tain an action against a person who disturbed his right. "It is not competent," says Pollock, C. B., "to create rights unconnected with the use and enjoyment of lands and annex them to it, so as to constitute a property in the grantee. This grant may act as a licence or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right."¹

No particular words are necessary for a grant or covenant conveying an easement. Any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose.²

No particular words of grant necessary.

Where the dominant tenement itself is conveyed, it would seem that all rights which the conveying party enjoyed by virtue of, and as appendant to, his estate, as against third parties, pass with it; and that if the dominant tenement be severed, each of the severed portions will retain the original right, provided no additional burden be thereby imposed on the servient tenement.³

Implied grant of an easement.

Where there has been unity of ownership of the dominant and servient tenements, and where consequently all easements have been merged in the general rights of property, questions of difficulty arise, on the severance of the tenements, as to whether such easements or quasi-easements are created anew by the severance. After some difference of opinion, the law must be taken to be settled as follows:

On severance of tenements.

By the grant of the part of a tenement, there will pass to the grantee, by implication of law, 1st. All those

There is an implied grant of necessary

¹ *Hill v. Tupper*, 2 H. & C. 121; see also remarks on the case by Bramwell, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 11; *Ackroyd v. Smith*, 10 C. B. 164.

² *Rowbotham v. Wilson*, 8 H. L. Cas. 362; *Holmes v. Seller*, 3 Lev. 305.

³ *Gale*, pp. 88, 369; 11 H. 6, 22, p. 19; 2 Roll. Abr. 60, pl. 1; *Beaudely v. Brook*, Cro. Jac. 289; *Fentiman v. Smith*, 4 East, 107; *Canham v. Fisk*, 2 Cr. & J. 126; *Tyringham's case*, 4 Rep. 36 b; *Wyat Wild's case*, 8 Rep. 78 b; *Harris v. Drewe*, 2 B. & A. 164; *Codling v. Johnson*, 9 B. & C. 934.

easements to the grantee.

But no corresponding reservation in favour of grantor.

Ewart v. Cochrane.

easements over the other part of the tenement without which the enjoyment of the severed portion could not be had at all; and 2ndly. All those continuous and apparent easements over the other part of the tenement which are necessary to the reasonable enjoyment of the part granted, and have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted; but, as a general rule, there is no corresponding implication in favour of the grantor, except in such cases as ways of necessity, where the use of the part reserved could not be had at all without such implied reservation.¹ A grantor, therefore, who wishes to reserve any easement over the part granted must use language to show that he intended to create the easement *de novo*.²

The proposition that where the dominant portion of the tenement is granted first, the grantee, as against the grantor and his successors, has by implied grant all those continuous and apparent easements over the other portion of the tenement necessary to the enjoyment of the part granted, has never been disputed, and is now finally declared to be the law by the House of Lords in the case of *Ewart v. Cochrane*.³ In this case the respondent claimed a right to send the refuse of his tan-yard through a drain into a cesspool in the appellant's garden. Both tenements had belonged to one owner, who had sold the tan-yard to the respondent's predecessor without alluding in the conveyance to the drain. He afterwards sold the garden to the appellant, who stopped the drain. In an action for the obstruction the House of Lords decided in favour of the respondent, on the following ground stated by Lord Campbell, L. C. :—"My lords, I consider the law

¹ *Wheeldon v. Burrows*, 12 Ch. D. 31; *Barnes v. Loach*, 4 Q. B. D. 494; *Watts v. Kelson*, L. R., 6 Ch. 166; *Polden v. Bastard*, L. R., 1 Q. B. 156, 161; *Crossley v. Lightowler*, L. R., 2 Ch. 476; *Suffield v. Brown*, 12 W. R. 356; *Pyer v. Carter*, 1 H. & N. 916; *Nicholas v.*

Chamberlain, Cro. Jac. 121; Gale on Easements, p. 96.

² *Barlow v. Rhodes*, 1 C. M. & R. 448, per Bayley, J.; *Worthington v. Gimson*, 29 L. J., Q. B. 116; 2 E. & E. 618; *Pearson v. Spencer*, 4 L. T., N. S. 769.

³ 4 MeQ. Scotch App. p. 117.

“ of Scotland as well as the law of England to be, that
 “ when two properties are possessed by the same owner,
 “ and there has been a severance made of one part from
 “ the other, anything which was used and was necessary for
 “ the comfortable enjoyment of that part of the property
 “ which is granted shall be considered to follow from the
 “ grant if there are the usual words in the conveyance. I
 “ do not know whether the words are essentially necessary;
 “ but where there are the usual words, I cannot doubt
 “ that that is the law. In the case of *Pyer v. Carter*
 “ that is laid down as the law of England, which will
 “ apply to any drain or any other easement which is
 “ necessary for the enjoyment of the property. When I
 “ say it was necessary, I do not mean that it was so
 “ essentially necessary that the property could have no
 “ value whatever without this easement, but I mean that
 “ it was necessary for the convenient and comfortable
 “ enjoyment of the property as it existed before the time
 “ of the grant.”¹

With regard to the second proposition, namely, that there is no implied reservation of such easements other than ways of necessity and the like in favour of the grantor, there has been some conflict of authority.

In *Nicholas v. Chamberlain*,² it was held by the Court that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereunto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case requires. So it is if the lessee for years of a house and land erect a conduit upon the land, and after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurte-

*Nicholas v.
Chamberlain.*

¹ *Ewart v. Cochrane*, 4 McQ. Scotch App. 117.

² Cro. Jac. 121.

nances to one, and the land to another, the vendee shall have the conduit and the pipes and liberty to amend them. But by Popham, if the lessee erects such a conduit, and afterwards the lessor, during the lease, sells the house to one, and the land wherein the conduit is, to another, after the lease determines, he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance. So it is if a disseisor of a house and land erects such a conduit, and the disseisee re-enter, not taking conusance of any such erection, nor using it, but presently after his re-entry sells the house to one, and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit; but in the principal case, by reason of the mispleading therein, there was not any judgment given.

In *Sury v. Pigott*,¹ Doddridge, J., says, "A man having a mill and a watercourse over his land, sells a portion of the land over which the watercourse runs; in such a case by necessity the watercourse remaineth to the vendor, and the vendee cannot stop it."

*Pyer v.
Carter.*

In the case of *Pyer v. Carter*,² the defendant's house adjoined the plaintiff's, and the action was for stopping a drain running under both houses. The two houses had formerly been one, and were converted into two by a former owner, who conveyed one to the defendant and afterwards the other to plaintiff. At the time of the conveyance the drain existed running under plaintiff's house, and then under defendant's, and discharging itself into

¹ Palmer, 444; Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; W. Jones, 145. As to other cases of necessary easements, see *Cox v. Mathews*, 1 Ventr. 237; *Palmer v. Fletcher*, Lev. 122; *Richards v. Rose*, 9 Ex. 220; *Murchie v. Black*, 19 C. B., N. S. 190; *Swansborough v. Coventry*, 9 Bing. 305; *Riviere v. Bower*, Ry. & Moo. 24;

Compton v. Richards, 1 Price, 27; *Grove v. Harding*, 27 L. J., Ex. 392, per Bramwell, B.; *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 766, Ex. Ch.; *Tyringham's case*, 4 Rep. 38; *Hertz v. Union Bank*, 2 Giff. 286; *White v. Bass*, 7 H. & N. 722; *Dodd v. Burchell*, 1 H. & C. 113; Gale, pp. 96—131.

² 1 H. & N. 916; Gale, p. 101.

the common sewer; water from the eaves of defendant's house fell on plaintiff's, and then ran into the drain on plaintiff's premises, and thence through the defendant's premises into the common sewer. The plaintiff's house was drained through the same drain. It was proved that plaintiff might have made a drain direct from his house into the common sewer, and it was not proved that the defendant when he purchased knew of the position of the drain. It was laid down by the Court that where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser will be entitled to the benefit of all drains from that house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without any express reservation or grant, inasmuch as the purchaser takes the house as it is: and that the question as to what is "*necessarily used*" depends upon the state of things at the time of the conveyance, and as matters then stood without alteration; and upon the argument urged that this was not an *apparent* and continuous easement, the Court said, that although the defendant did not know of the existence of the drain at the time of the conveyance to him, yet as he must or ought to have known that there was some drainage for the waters he ought to have inquired, and that those things must be considered apparent which would be so upon a careful inspection by a person conversant with such matters.

The doctrines laid down in *Pyer v. Carter* have been strongly dissented from in two cases in the Court of Chancery. The first, that of *Suffield v. Brown*,¹ was a case of a dock and wharf owned by the same party, where the bowsprits of vessels in the dock had to project over the corner of the wharf in order to enter the dock if they were of any considerable size. The wharf was sold to one without any reservation of the right claimed, and the dock to another. The Master of the Rolls, Lord Romilly, held that the right to project the bowsprits was necessary to the enjoy-

*Suffield v.
Brown.*

¹ 12 W. R. 356.

ment of the dock, and was, therefore, impliedly granted by the conveyance. On appeal, Lord Chancellor Westbury reversed this decision of the Master of the Rolls: "Where," he says, "the owner of two adjoining properties makes an absolute grant of one of them without reservation, neither he nor those claiming under him can derogate from that grant by claiming over the property so granted an easement in respect of the other property, the user of which existed during the unity of ownership."¹ In the course of his judgment he criticises Gale on Easements, ch. 4, and says, "If nothing more be intended by this passage than to state that, on the grant by the owner of an entire heritage of part of that heritage as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owners of the entirety for the benefit of the parcel granted, there can be little doubt of its correctness; but it seems clear that the learned writer uses the word 'grant' in the sense of reservation and mutual grant, and intends to state that where the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous, apparent, or necessary easements out of or upon the thing granted as have been used by the owner for the benefit of the unsold property during the unity of possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the *quasi* servient or the *quasi* dominant. But I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor." His lordship goes on to disapprove of *Pyer v. Carter*, and

¹ *Suffield v. Brown*, 12 W. R. 356.

says, "I cannot look upon that case as rightly decided, and must wholly refuse to accept it as any authority."

In *Crossley v. Lightowler*¹ it was held, that on the conveyance of riparian land the grantee is entitled as against the grantor to a flow of pure water past the land granted, and that the grantor cannot, in the absence of any express reservation to that effect, justify fouling the water, although he may have done so from the drainage of a manufactory existing before and at the time of the grant; and Lord Chelmsford, L. C., in giving judgment, approves of Lord Westbury's dicta in *Suffield v. Brown*, and adds, "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous. For *non constat* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make, in every case of this kind, an implied reservation; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity."

*Crossley v.
Lightowler.*

In the case of *Watts v. Kelson*,² in 1860 the owner of two properties, A. and B., made a drain from a tank on property B. to some cattle sheds on property A., for the purpose of supplying them with water, and they were so supplied until 1863, when the owner sold property A. to the plaintiff, "with all waters, water-courses, &c., to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof held, enjoyed, or reputed as part thereof, or as appurtenant thereto;" and the plaintiff had the use of the water as above until defendant, a subsequent purchaser of property B., stopped it; it was held that the watercourse was a continuous easement necessary to the use of property A., and would have passed by implication without any words of grant; and

*Watts v.
Kelson.*

¹ L. R., 2 Ch. 478.

& E. 1058; and see also cases cited by Gale, p. 90.

² *Watts v. Kelson*, L. R., 6 Ch. 166; *Wardle v. Brocklehurst*, 1 E.

further, that supposing the use of the water were only convenient and not necessary, the general words of the grant were sufficient to pass it. It was held, moreover, in this case, that the right claimed being a right to have the accustomed flow of water through the pipes without regard to the purpose for which plaintiff used it, the right was not lost by his using the water for cottages erected on the site of the cattle sheds. In the course of the argument, Mellish, L. J., says: "I think the order of the two conveyances in point of date is immaterial, and that *Pyer v. Carter*,¹ is good sense and good law. Most of the common law judges have not approved of Lord Westbury's observations on it." James, L. J.—"I also am satisfied with the decision in *Pyer v. Carter*."¹

*Wheeldon v.
Burrows.*

In the late case of *Wheeldon v. Burrows*,² a vendor conveyed a plot of land, part of his property, to A., without any reservation of the easement of access of light, and subsequently another adjoining plot, part of the property retained, to B. Bacon, V.-C., held that the easement, though apparent and continuous, was not of necessity, and consequently there was no implied reservation of it by the vendor out of his conveyance to A.

On appeal, the Court of Appeal,³ consisting of James, Baggallay, and Thesiger, L.JJ., upheld the decision of the Vice-Chancellor; and Thesiger, L. J., delivering the judgment of the Court, discusses in an elaborate judgment the previous cases, and lays down the law as follows: "We have had," says the Lord Justice, "a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those

¹ 1 H. & N. 916.

² 12 Ch. Div. 31; 27 W. R. 165; see *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13; *Russell v.*

Harford, L. R., 2 Eq. 507; *Curriers' Co. v. Corbett*, 11 Jur., N. S. 719.

³ 12 Ch. Div. 48.

“ continuous and apparent easements (by which of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant. It has been argued before us, that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation, and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by, and which is to be attributed to, Lord Westbury in *Suffield v. Brown*,¹ it appears to me that it has existed almost as far back as we can trace the law upon the subject; and I think it right, as the case is one of considerable importance, not merely as regards the

¹ 4 De J. & S. 185.

“ parties, but as regards vendors and purchasers of land
 “ generally, that I should go with some little particularity
 “ into what I may term the leading cases upon the
 “ subject.” His lordship then goes on to cite *Palmer v. Fletcher*,¹ *Nicholas v. Chamberlain*,² *Tenant v. Goldwin*,³ *Swansborough v. Coventry*,⁴ *Cox v. Mathews*,⁵ and *Compton v. Richards*,⁶ as authorities for the principles of law stated at the beginning of his judgment, and continues: “ I now
 “ come to *Pyer v. Carter*,⁷ which seems to break the
 “ hitherto unbroken current of authority upon this point,
 “ and there can be no doubt that Sir Henry Jackson is
 “ justified in saying, that if that case is right, this appeal
 “ ought to be allowed. That was a case of a somewhat
 “ special character. A house was conveyed to the defend-
 “ ant by a person who was the owner of that house, and
 “ also of the house which was subsequently conveyed to
 “ the plaintiff; and there had been, during the unity of
 “ the ownership, the enjoyment of the easement of a spout
 “ which extended from the defendant’s premises over the
 “ plaintiff’s premises, and by which water was conveyed on
 “ to the latter. But it is material to observe that the
 “ water, when it came on to what was subsequently the
 “ plaintiff’s premises, was conveyed into a drain on the
 “ plaintiff’s premises, which drain passed through the
 “ defendant’s premises, and in that way went out into the
 “ common sewer. Subsequently, the house over which
 “ this easement existed, was conveyed to the plaintiff, and
 “ upon an obstruction of the drains in the defendant’s
 “ house, which, be it observed, immediately caused a
 “ flooding of the plaintiff’s house by the very water
 “ coming from the defendant’s house, the plaintiff brought
 “ his action; and it was held there that the plaintiff was
 “ entitled to maintain his action, and that upon the
 “ original conveyance to the defendant, there was a reser-

¹ 1 Lev. 122.² Cro. Jac. 121.³ 2 Ld. Raym. 1089, 1093.⁴ 9 Bing. 305.⁵ 1 Vent. 237.⁶ 1 Price, 27.⁷ 1 H. & N. 916.

“ vation to the grantor of the right to carry away this
 “ water which came from the defendant’s premises by the
 “ medium of the drain, which also went through his
 “ premises. Though those circumstances were special in
 “ their character, there is no doubt that the principles laid
 “ down by the Court of Exchequer were as wide as
 “ possibly could be. That Court laid down that there was
 “ no distinction between implied reservation and implied
 “ grant; and this, as it appears to me, broke the hitherto
 “ unbroken current of authority upon this subject.”

His lordship then states that the principles of law laid down in *Pyer v. Carter* were distinctly overruled in *White v. Bass*,¹ and cites with approval the judgment of Lord Westbury in *Suffield v. Brown* as stated on a former page.² “ But,” he continues, “ *Suffield v. Brown*² has been confirmed by an equally high authority, for, in *Crossley and Sons v. Lightowler*,³ Lord Chelmsford as Lord Chancellor had to deal with a similar question, and he there says: “ ‘ Lord Westbury, however, in the case of *Suffield v. Brown*, refused to accept the case of *Pyer v. Carter*⁴ “ ‘ as an authority, and said: “It seems to be more “ ‘ reasonable and just to hold that if the grantor intends “ ‘ to reserve any right over the property granted, it is his “ ‘ duty to reserve it expressly in the grant, rather than to “ ‘ limit and cut down the operation of a plain grant (which “ ‘ is not pretended to be otherwise than in conformity with “ ‘ the contract between the parties), by the fiction of an “ ‘ implied reservation.” I entirely agree with this view. “ ‘ It appears to me to be an immaterial circumstance that “ ‘ the easement should be apparent and continuous, for “ ‘ *non constat* that the grantor does not intend to re- “ ‘ linquish it unless he shows the contrary by expressly “ ‘ reserving it. The argument of the defendants would “ ‘ make, in every case of this kind, an implied reservation

¹ 7 H. & N. 722.

³ L. R., 2 Ch. 478.

² 4 De J. & S. 185, *ante*, p. 219

⁴ 1 H. & N. 916.

et seq.

“ ‘by law ; and yet the law will not reserve anything out
 “ ‘of a grant in favour of a grantor, except in case of
 “ ‘necessity.’ Now the only case in the Court of Appeal
 “ ‘which is suggested as being contrary to this high
 “ ‘authority of two Lord Chancellors is *Watts v. Kelson*,¹
 “ ‘and no doubt there are observations of Lord Justice
 “ ‘Mellish to the effect that the order of conveyance in
 “ ‘point of date is immaterial, that *Pyer v. Carter*² is good
 “ ‘sense and good law, and that most of the common law
 “ ‘judges have not approved of Lord Westbury’s observa-
 “ ‘tions. But, putting aside for the moment that this was
 “ ‘a mere *dictum* of the Lord Justice during the argument,
 “ ‘I must observe that this is not exactly so, as in *White v.*
 “ ‘*Bass*,³ the judges of the Court of Exchequer had dis-
 “ ‘tinctly, as regards the reasoning of *Pyer v. Carter*,
 “ ‘overruled that case. No doubt, also, Lord Justice
 “ ‘James says, ‘I am satisfied with the decision in *Pyer*
 “ ‘*v. Carter*.’ But in the considered judgment of the
 “ ‘Court, when, if it had been intended to say that
 “ ‘*Suffield v. Brown*⁴ was not law, one would have
 “ ‘thought there would have been something distinct upon
 “ ‘the point, there is not one word to the effect of that
 “ ‘which had been said by the Lords Justices during the
 “ ‘argument. All that is said about it is this: Lord
 “ ‘Justice Mellish, who delivered the judgment, after
 “ ‘referring to *Nicholas v. Chamberlain*⁵ said, ‘This case
 “ ‘has always been cited with approval, and is identical not
 “ ‘only in principle, but in its actual facts with the case
 “ ‘now before us. It was expressly approved of by Lord
 “ ‘Westbury in *Suffield v. Brown*,⁶ where, though he ob-
 “ ‘jected to the decision in *Pyer v. Carter*,⁷ in which it
 “ ‘was held that a right to an existent continuous apparent
 “ ‘easement was impliedly reserved in the conveyance by
 “ ‘the owner of two houses in the alleged servient houses,

¹ L. R., 6 Ch. 166, 174.

² 1 H. & N. 916.

³ 7 H. & N. 722.

⁴ 4 De J. & S. 185.

⁵ Cro. Jac. 121.

⁶ 4 De J. & S. 185.

⁷ 1 H. & N. 916.

“ ‘yet he seems to agree that the right to such an easement
 “ ‘would pass by implied grant where the dominant tene-
 “ ‘ment is conveyed first;’ and that is what the Court of
 “ Appeal had to decide in *Watts v. Kelson*.¹ Therefore
 “ *Watts v. Kelson* is no authority to justify us in over-
 “ ruling *Suffield v. Brown*,—still less for overruling it,
 “ supported as it is by the case of *Crossley and Sons v.*
 “ *Lightowler*.² Thus, then, as it appears to me, stand the
 “ principal authorities on the general rules of law which I
 “ stated at the commencement of this judgment.” The
 Lord Justice then notices a number of other cases³ which
 were cited to illustrate the exceptions to the second
 general rule laid down by him at the commencement of
 his judgment—viz., ways of necessity—and continues:
 “ These cases in no way support the proposition for which
 “ the appellant in this case contends; but, on the con-
 “ trary, support the propositions that in the case of a
 “ grant you may imply a grant of such continuous and
 “ apparent easements, or such easements as are necessary
 “ to the reasonable enjoyment of the property conveyed,
 “ and have, in fact, been enjoyed during the unity of
 “ ownership; but that, with the exception which I have
 “ referred to of easements of necessity, you cannot imply
 “ a similar reservation in favour of the grantor of land.
 “ Upon the question whether there is any other exception,
 “ I must refer both to *Pyer v. Carter*⁴ and to *Richards v.*
 “ *Rose*;⁵ and, although it is quite unnecessary for us to
 “ decide the point, it seems to me that there is a possible
 “ way in which these cases can be supported without in
 “ any way departing from the general maxims upon
 “ which we base our judgment in this case. I have
 “ already pointed to the special circumstances in *Pyer v.*

¹ L. R., 6 Ch. 166.² L. R., 2 Ch. 478.³ *Pennington v. Galland*, 9 Ex. 1,
12; *Clark v. Cogge*, Cro. Jac. 170;
Staple v. Haydon, 6 Mod. 1; *Chichester v. Lethbridge*, Willes, 72, n.;*Dutton v. Taylor*, Lutw. 1487;*Davies v. Sear*, L. R., 7 Eq. 427,
431.⁴ 1 H. & N. 916.⁵ 9 Ex. 218.

“ *Carter*, and I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement which had been enjoyed during the unity of ownership, of pouring his water upon the grantor’s land, he should also be held to take it, subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land, and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right or wrong comes for discussion, to consider that point. *Richards v. Rose*, although not identically open to exactly the same reasoning as would apply to *Pyer v. Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other. Is there anything unreasonable—is there not, on the contrary, something very reasonable—to suppose in that case that the man who takes a grant of the house first, and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own?” His lordship concludes his judgment by referring again to the case of *Swansborough v. Coventry*,¹ and by holding that in the present case the fact that the two tenements, though not sold together, were put up at an auction together as part and parcel of one sale, could not affect the question.

What words necessary to pass an easement not of necessity.

With regard to what words are necessary in a conveyance to pass an easement not necessary to the enjoyment of the tenement granted, it has been held that general words, such as “appertaining,” “belonging,” &c., are insufficient on the severance of tenements to pass such rights as ways, commons, &c.; but in the case of *Wardle v. Brocklehurst*, it

¹ 9 Bing. 305.

was held that, by the grant of a farm with the usual words "with all watercourses used, occupied, or enjoyed with the premises," the benefit of a culvert, and a stream of water running through the lands of the vendor to the farm granted, passed; and Lord Campbell says, "The land must be taken to be conveyed in the state in which it then was, that is, we must take it that the culvert so bringing down the water and all the watercourses are granted, not only those which belong and appertain to the premises, but also those which were used and enjoyed therewith." This judgment was affirmed in the Exchequer Chamber, and it was held that the defendant was entitled to use the water, not only for the farm which was sold to him, but for a manufactory which he possessed beyond.¹

It should be here noticed that the maxim of law is, that whosoever grants a thing, is supposed also tacitly to grant that without which the grant would be of no effect;² and that consequently, upon the grant of an easement, all such secondary easements as are essential for its full enjoyment will pass also without further words of grant.² Thus, where there is an easement of watercourse over another's land, there is an implied right of going on that land to clear and repair it, and, where there is a right of drawing water, this includes the right of going and returning over the servient owner's land.⁴ In executing works necessary for the enjoyment of the easement, nothing of course must be done to alter the accustomed mode of enjoyment in such a manner as to impose a greater burden on the servient tenement. Such secondary

Secondary easements.

¹ 1 E. & E. 1058; see also *Watts v. Kelson*, L. R., 6 Ch. 175.

² 11 Rep. 52; Angell, p. 278.

³ See Gale, p. 549.

⁴ *Brown v. Best*, 1 Wils. 174; Bracton, lib. 4, ff. 232 a, 233 a; *Nicholas v. Chamberlain*, Cro. Jac.

121; *Hinchcliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; see also *Pyer v. Carter*, 1 H. & N. 916; *Pearson v. Spencer*, 3 B. & S. 761; *Dodd v. Burchell*, 1 H. & C. 113; and American cases in Angell, ch. 5.

easements, forming in most cases one entire right with the principal easement, cease also on its extinction.¹

No alteration can be made in an easement increasing the restriction.

As every easement is a restriction upon the rights of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no grant to exist, the right must be limited by the amount of enjoyment proved to have been had;² but a mere alteration in the mode of enjoyment, whereby no injury is caused to the servient heritage, will not destroy the right.³

By prescription.

The existence⁴ of the evidence necessary to prove an actual grant of a special right to a watercourse, may be inferred from a long use and enjoyment without interruption. It is laid down in Bracton,⁵ that all incorporeal rights or services may be acquired by acquiescence and use, and lost by neglect and disuse. Indeed, all the writers upon the common law of England, as well as the civilians, have recognized the principle, that a right to any incorporeal hereditament may be acquired by lapse of time. This mode of acquisition has been by both denominated prescription, which they say is founded on usage,—*longa, continua, et pacifica*. They also state that every prescription supposes a grant once made and afterwards lost; and that, therefore, nothing can be claimed by prescription⁶ which in its nature could not have been granted.

Prescription at common law.

Prescription may be defined as “a title acquired by possession had during the time and in the manner fixed by law.”⁷ By common law an enjoyment to confer a title

¹ Civil Law, L. 17, ff. quemad. serv. amit.; *Peter v. Daniel*, 5 C. B. 563; *Beeston v. Weate*, 5 E. & B. 986.

² See *Cawkwell v. Russell*, 26 L. J., Ex. 34.

³ *Luttrell's case*, 4 Rep. 86; *Hall v. Swift*, 6 Scott, 167; 4 Bing. N. C. 381.

⁴ Angell on Watercourses, p.

351.

⁵ Lib. 4, xxxviii, sect. 3.

⁶ *Carlyon v. Lovering*, 1 H. & N. 784; *Rochdale Co. v. Radcliffe*, 18 Q. B. 287; see also *Ivimey v. Stocker*, L. R., 1 Ch. 396.

⁷ Gale, 151; Co. Litt. 113 b; see also the judgment of Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 100, where an elaborate history

to an easement must have continued during a period co-extensive with the memory of man, or, in legal phrase, "during time whereof the memory of man runneth not to the contrary." "The time of memory," says Blackstone, "has long ago been used and ascertained by the law to commence from the reign of Ric. I." The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment, during a shorter time, raised a presumption that such enjoyment had existed for the necessary period. Where, however, the actual origin of the enjoyment was shown to have been of more recent date than the prescription, the right in earlier cases was held to be defeated.¹

To obviate the inconvenience, which must have arisen By lost grant. from allowing long enjoyment to be defeated merely by showing that the origin of the right was subsequent to the reign of Ric. I., the Courts introduced a new title by the presumption of a grant made and lost in modern times.² According to this doctrine, from evidence of enjoyment of from twenty to sixty years,³ a jury were at liberty to presume a grant of the right claimed, although the origin of the right was shown to be more recent than the time of legal memory.⁴ Such a presumption might be rebutted;⁵ but on the recommendation of a judge that the evidence warranted the presumption of a grant, a jury were bound to find that such had existed.⁶

of the origin of the doctrine of prescription is given; and same case on appeal, 4 Q. B. D. 462.

¹ Gale, p. 156; see *Jenkins v. Harvey*, 1 Cr. M. & R. 894; *Bury v. Pope*, Cro. Eliz. 118.

² Gale, p. 159.

³ See *Rolle v. Whyte*, L. R., 3 Q. B. 303.

⁴ *Keymer v. Summers*, cited in *Read v. Brookman*, 3 T. R. 157; Bull. N. P. 74; *Campbell v. Wilson*, 3 East, 294; see also *Mayor of Hull v. Horner*, Cowp. 102; *Eldridge v.*

Nott, ib. 214; *Lady Dartmouth v. Roberts*, 16 East, 334; *Holcroft v. Keel*, 1 Bos. & Pul. 400; *Lovett v. Wilson*, 3 Bing. 115; *Codling v. Johnson*, 9 B. & C. 933; see per Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 100.

⁵ See per Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 100.

⁶ Per Alderson, B., in *Jenkins v. Harvey*, 1 C. M. & R. 895; per Parke, B., in *Bright v. Walker*, 1 C. M. & R. 217.

The Prescrip-
tion Act.

The statute 2 & 3 Will. IV. c. 71, commonly called the Prescription Act, was intended further to accomplish this object, by shortening, in effect, the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury.¹

The provisions of this Act, so far as they relate to the easement of watercourse, are as follows:—By sect. 2, it is enacted, “That no claim which may be lawfully made at “the common law, by custom, prescription, or grant, to “any way or other easement, or to any watercourse,² or “the use of any water,³ to be enjoyed or derived upon, “over, or from any land or water of our said Lord the “King, his heirs or successors, or being parcel of the “Duchy of Lancaster, or of the Duchy of Cornwall, or “being the property of any ecclesiastical or lay person, or “body corporate, when such way or other matter as “herein last before mentioned shall have been actually “enjoyed by any person claiming right⁴ thereto, without “interruption for the full period of twenty years, shall be “defeated or destroyed by showing only that such way or “other matter was first enjoyed at any time prior to such “period of twenty years; but nevertheless, such claim “may be defeated in any other way by which the same is “now liable to be defeated;⁵ and where such way or

¹ *Bright v. Walker*, 1 C. M. & R. 217, per Parke, B.

² A claim to adulterate the water of a natural stream is a claim to a watercourse within this section; *Wright v. Williams*, 1 M. & W. 77; *Carlyon v. Lovering*, 1 H. & N. 797.

³ A claim of right to go on any man's close, and take water from a spring there, is an easement; *Race v. Ward*, 4 E. & B. 702; *Manning v. Wasdale*, 5 A. & E. 764; *Constable v. Nicholson*, 14 C. B., N. S. 230. A right to keep an opening from an ancient ditch into a stream closed, can be established by twenty years' uninterrupted user; *Drewitt v. Sheard*, 7 C. & P. 465. A claim to have

water diverted, which would otherwise have come to plaintiff's land, is a claim to a watercourse under 2 & 3 Will. IV. c. 71; *Mason v. Shrewsbury Rail. Co.*, L. R., 6 Q. B. 578. A claim to the waste water allowed to pass from a canal is not a claim to a watercourse under the Prescription Act; *Staffordshire Canal v. Birmingham*, L. R., 1 H. L. 254. A claim to a weir in a non-navigable river is within the Act; *Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657.

⁴ See *Tickle v. Brown*, 4 A. & E. 369.

⁵ As to this, see Gale on Easements, p. 171, n. (g).

“ other matter as herein last before mentioned shall have
 “ been so enjoyed as aforesaid for the full period of forty
 “ years,¹ the right thereto shall be deemed absolute and
 “ indefeasible, unless it shall appear that the same was
 “ enjoyed by some consent or agreement expressly given
 “ or made for that purpose by deed or writing.”

By sect. 4, it is provided, that each of the respective periods before mentioned are to be deemed and taken to be the period next before some suit or action in which the right is disputed, and that no act is to be deemed an interruption, unless the same shall have been submitted to or acquiesced in for one year after notice given.

Sect. 5 provides that, in pleading, it shall be sufficient to claim the enjoyment as of right.

Sect. 6 provides that no presumption shall be allowed in favour of any claim, upon proof of enjoyment for less than the number of years provided by the Act.²

Sect. 7 provides that the time during which any person otherwise capable of resisting any claim, shall be infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action shall have been diligently prosecuted, until abated by the death of the party or parties,

¹ In *Mason v. Shrewsbury Railway* (L. R., 6 Q. B. 578), a canal company before 1800, under powers of an Act of Parliament, diverted to the canal a great part of the water of a brook which flowed through plaintiff's land. The rest of the water continued to flow as before. In 1847, defendants, under an Act of Parliament, bought and discontinued the canal. In 1864, defendants restored, by means of a cut, the water which had been diverted to the brook. In 1865 they sold the part of the canal on which was the cut. The bed of the brook, owing to the diminished scour from 1800 to 1853, had become silted up so as not to be sufficient to carry off the water in extraordinary floods. In 1866, such a flood occurred, and damaged plaintiff's lands. The

Court held, that there being no obligation imposed on the canal company to continue the diversion of the water, plaintiff had no right of action. By Blackburn and Hannen, JJ., on the ground that, though the claim to have the water diverted was a claim to a watercourse under the Prescription Act, yet the enjoyment was not of right, and therefore, though of more than forty years, it conferred no right on the plaintiff. By Cockburn, C. J., on the ground that plaintiff, the owner of the servient tenement, could acquire no right against the owner of the dominant tenement. See also *National Manure Co. v. Donald*, 4 H. & N. 8.

² *Ennor v. Barwell*, 6 Jur., N. S. 1233.

shall be excluded from the computation of the periods hereinbefore mentioned, except in cases where the right or claim is hereby declared to be absolute and indefeasible.

By sect. 8, it is provided, that where any land or water, upon, over, or from which any such way or convenient watercourse or use of water shall have been or shall be enjoyed, is held for life or any term beyond three years, the time of the enjoyment of any such way or other matter during the continuance of such term, shall be excluded in the computation of the said period of forty years; provided the reversioner contests the claim within three years after the lease expires.¹

The Prescription Act does not supersede the common law.

The common law as to the acquisition of easements has not been superseded by the Prescription Act, although it has given some increased facilities to a party claiming an easement. He may proceed on election, either under the statute, or according to the common law, or both.² Where he proceeds under the statute, no presumption can be founded upon an enjoyment for a shorter period than that which is applicable under the act to the case in question; ³ whereas, at common law, a shorter time, if aided by confirmatory evidence, has been held sufficient to support a verdict.⁴

By and against whom claims by prescription may be made.

As the right to an easement can only exist in respect of a tenement, the continued user by which the easement is to be acquired must be by the person in possession⁵ of, or

¹ See Mr. Gale's explanation of this section, p. 184; and *Wright v. Williams*, 1 M. & W. 77; *Only v. Gardiner*, 4 M. & W. 496; *Richards v. Fry*, 7 A. & E. 698; *Jones v. Price*, 3 Bing. N. C. 52; *Palk v. Skinner*, 18 Q. B. 568; *Clayton v. Corby*, 2 Q. B. 813; *Pye v. Mumford*, 11 Q. B. 675.

² Gale, p. 165; Phear, *Rights of Water*, p. 79; *Warrick v. Queen's College, L. R.*, 6 Ch. 728; *Ladyman v. Grave, L. R.*, 6 Ch. 764, n.; *Aynsley v. Glover, L. R.*,

10 Ch. 283.

³ *Ennor v. Barwell*, 6 Jur., N. S. 1233.

⁴ Per Lord Ellenborough in *Bealey v. Shaw*, 6 East, 215; per Chambre, J., in *Woodyer v. Had-den*, 5 Taunt. 125; and see *Reg. v. Petrie*, 4 E. & B. 737.

⁵ See *Gaved v. Martyn*, 19 C. B., N. S. 732, where the lessee or licensee of the right of digging clay, was held to have sufficient interest in the soil to claim a prescriptive right to the flow of water

claiming under the owner of, the dominant tenement; and as such user is evidence of a previous grant, and as the right claimed is in its nature not of a temporary kind, but one which permanently affects the rights of property in the servient tenement, it follows that such grant can only have been legally made by a party capable of imposing such a permanent burthen upon the property, *i.e.* the owner of an estate of inheritance,¹ and, therefore, in order that such user may confer an easement, the owner of the servient inheritance must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed; his abstaining from interference will then be construed as an acquiescence,²—*contra non volentem agere non currit prescriptio*.³

As by the common law, the title to an easement is from a presumed grant by the owner of the servient tenement, and as only such easements can be claimed by the Prescription Act as could be lawfully claimed at common law, by custom, prescription, or grant, no claim can be founded by long user to any easement which the servient owner is under a legal or physical disability to grant. Thus, in the case of *Chasemore v. Richards*,⁴ where the action was for intercepting percolating water, the House of Lords held that as no grant could have been made of such percolating water, length of time could raise no presumption of such a grant.

No easement can be claimed when the servient owner is under a disability to grant.

So, in *The Staffordshire Canal v. Birmingham Canal*,⁵ where a prescriptive claim, by user of forty years, was set up to a use of water which a canal company was not empowered to make by their Act, Lord Chelmsford, L. C., says, "To impose such a servitude upon the water in their

under 3 & 4 Will. IV. c. 71; see *Ivimey v. Stocker*, L. R., 1 Ch. 396.

¹ *Daniel v. North*, 11 East, 372; see Phear, Rights of Water, pp. 80, 85; 1 Wms. Saund. 346; 2 Wils. 258.

² *Gray v. Bond*, 2 Brod. & Bing.

667.

³ Gale, p. 189.

⁴ 7 H. L. C. 349.

⁵ L. R., 1 H. L. 254; *Rochdale Canal v. Radcliffe*, 18 Q. B. 287; *National Manure Co. v. Donald*, 4 H. & N. 8; see also *Ellwell v. Birmingham Canal*, 3 H. L. 812.

“canal as that contended for by the appellants, would
 “have been *ultra vires* of the respondents, and consequently
 “length of user could never confer an indefeasible claim
 “upon appellants under the Prescription Act, as no grant
 “of the use of the water could have been lawfully made
 “by the respondents.”

So, in *The Rochdale Canal v. Radcliffe*,¹ the owners of land within twenty yards of a canal were empowered by statute 34 *Geo. III. c. 78*, to take water from the canal for the sole purpose of condensing steam for their engines, such water to be returned to the canal (allowing for inevitable waste) so that no obstruction should accrue to the navigation, the surplus water to go to the Bridgwater Canal. The company sued the defendant for taking more water than was sufficient for condensing steam, and for using it for other purposes. The defendant pleaded a user as of right for twenty years to draw off so much water as was necessary for other purposes. The jury found the twenty years' user as of right, and a verdict was ordered to be entered for the defendants. On a motion by the plaintiffs for judgment, *non obstante veredicto*, the Court of Queen's Bench held, that the company could not, consistently with the Acts of Parliament regulating their canal, have granted the water for other purposes than that permitted by the statute 34 *Geo. III. c. 78*. That an actual grant, if proved, for the purposes mentioned in the plea, would have been illegal and no justification, and, therefore, that the grant for such purposes, implied from twenty years' user, was no legal defence.

The enjoyment which, by length of time, both at common law and under the statute, will confer the right to an easement must be uninterrupted,² open,³ and of right,—

¹ 18 Q. B. 287.

² An act of partial interruption may qualify an easement without destroying it. Thus, in *Rolle v. Whyte* (L. R., 3 Q. B. 286), where a weir was claimed across a river by prescription, and a miller on the banks was proved to have occasionally interrupted it

by shutting down a fender, it was held that this did not destroy the right, as there was nothing to prevent a second easement being acquired, as subordinate to one already existing, where the subject-matter admitted of it.

³ See *Angus v. Dalton*, 3 Q. B. D. 85.

Enjoyment
must be *nec*
vi, nec clam,
nec precario,

nec vi, nec clam, nec precario.¹ Where, therefore, the right² claimed has been interrupted by any lawful impediment, or where the easement has, either from the mode in which the party enjoys it, or from the nature of the easement itself, been secret, or where again the enjoyment has originated under licence or permission from the owner of the servient tenement, no right will be gained by length of time.³ Under the statute, however, where the right to a watercourse has existed for forty years, it will not be invalidated unless such licence be by deed or writing.⁴

In order, moreover, to raise the presumption of a grant of an easement in a watercourse, the user or enjoyment must have been adverse,⁵—that is, have interfered with the enjoyment of the owner of the servient tenement. “By usage,” says Cresswell, J., delivering the judgment of the Court in *Sampson v. Hoddinot*⁶ “(a man) may acquire a right to use the water in a manner not justified by his natural right; but such acquired right has no operation against the natural right of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant’s tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant’s

¹ Civ. Law, 1, ff. de serv. 1. 10, ff.; Co. Litt. 113 b; Bracton, lib. 2, f. 51, f. 52 a, 222 b.

² Angell, p. 369; see *Gaved v. Martyn*, *post*, 253, where the question of right is fully treated; *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 578.

³ See *per Erle, C. J.*, 17 Q. B.

275; *Bright v. Walker*, 1 C., M. & R. 219; Gale, p. 209.

⁴ 2 & 3 Will. IV. c. 71, s. 3; see *per Blackburn, J.*, in *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 578.

⁵ Angell, p. 368.

⁶ 1 C. B., N. S. 611.

“tenement, or the natural use of the water by the defendant, so as to render it a servient tenement. But if the user by the defendant has been beyond his natural right, it matters not how much the plaintiff has used the water, or whether he has used it at all. In either case his right has been equally invaded, and the action is maintainable.”

User, moreover, which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement either affirmative or negative.¹

Claim to easements by custom.

An easement may also be claimed by particular custom, as in the inhabitants of a district to use a common watering place; and an action will lie by an inhabitant for the infringement of the right, without proof of special damage.² Thus, in *Harrop v. Hirst*,³ where the plaintiff had, in common with the inhabitants of a particular district, enjoyed a customary right at all times to take water from a spout in a highway for domestic purposes, and defendant, a riparian owner, stopped the water, the Court held that an action was maintainable without any proof of special damage, inasmuch as the act of defendant might, if repeated often enough, without interruption, furnish evidence in derogation of the plaintiff's legal rights.

So, in *Race v. Ward*,⁴ and *Manning v. Wasdale*,⁵ a right to go on another's land and take water for domestic purposes, was held to be an easement, and not a *profit à prendre*, and so capable of being claimed by custom by the inhabitants of a district.

In *Carlyon v. Lovering*,⁶ a right was claimed by custom to use a natural stream for the purpose of washing ore,

¹ *Sturges v. Bridgman*, 11 Ch. D. 852; *Webb v. Bird*, 13 C. B., N. S. 841; *Chasemore v. Richards*, 7 H. L. 349; see *Angus v. Dalton*, 3 Q. B. D. 85; 4 Q. B. D. 162.

² *Westbury v. Powell*, cited in

Fineux v. Hoveden, Cro. Eliz. 664.

³ L. R., 4 Ex. 43; see *Ivimey v. Stocker*, L. R., 1 Ch. 396.

⁴ 4 E. & B. 702.

⁵ 5 A. & E. 758.

⁶ 1 H. & N. 784.

and carrying away sand, stones, rubble, and other stuff dislodged and severed from the soil in working a mine. The Court found the custom to be good, and Watson, B., in delivering judgment, thus states the law with regard to customs: "It is settled that a custom to be valid in law must be reasonable, certain, and defined. It was objected that the custom pleaded in the present case was unreasonable and indefinite, as the exercise of the custom might go to the destruction of the plaintiff's land adjoining the stream; that there was no limit to the user as to the times and extent of the user. No doubt if that were so, the pleas would be bad; but we think they are not open to these objections. The exercise of the privilege as claimed was in respect of working a mine and winning the ore where the stream passed through defendant's land. Thus, the user is limited to the necessary working of the mine, and the quantity of water sent down, although not expressly so alleged. . . . We think that the custom alleged is sufficiently definite, and is not unreasonable. It is possible more stuff may come down at one time than another; but that does not show that the custom is bad (see *Tyson v. Smith*).¹ We think it is to be confined in user to the necessary working of the mine, etc."

Particular Easements of Water.

The right which a riparian owner has to the flow of a natural stream in its natural state, may be interfered with by the acquisition of easements, the effect of which may be to alter its quantity, velocity, or quality, to his prejudice. Thus, a right to divert and obstruct the flow of the stream, or to pollute its waters, may be gained by Act of Parliament, by express grant, or by long enjoyment, as prescribed by law.²

¹ 6 A. & E. 745; 9 A. & E. 406. See *Ivimey v. Stocker*, L. R., 1 Ch. 396, and *Gaved v. Martyn*, 14 W. R. 62, as to acquisition of water-

course by tin-bonders under custom of Cornwall.

² *Sampson v. Hoddinot*, 1 C. B., N. S. 590; *Embrey v. Owen*, 6 Ex.

“The general rule of law,” says Lord Ellenborough,¹ “as applied to this subject, is, that, independent of any particular enjoyment used to be had by another, every man had the right to have the advantage of a flow of water in his own land, without diminution or alteration; but an adverse right may exist founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet, if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right.”

Easement of
diversion and
obstruction.

“The right of diverting water,” says Cockburn, C. J., in *Mason v. Shrewsbury Railway Co.*,² “which, in its natural course, would flow along the land of a riparian owner, and of conveying it to the land of the party diverting it, the *servitus aquæ ducendæ* of the civilians, is an easement well known to the law of this, as of every other country. Ordinarily, such an easement can be created by the laws of England only by grant or by long-continued enjoyment from which the existence of a former grant may be reasonably presumed. But such a right may, like any other right, be created in derogation of a prior right by the action of the legislature. But, however it is called into existence, the right is essentially the same.” From the above case, it would seem that a right to divert the waters of a natural stream, for the purposes of a canal, is an easement which may be conferred on a company by their Act of Parliament, and, as such, subject to the law of easements generally.

Of the acquired right to divert the waters of a stream, the cases of *Beeston v. Weate*³ and *Saunders v. Newman*⁴

353; *Howard v. Wright*, 1 Sim. & Stu. 190.

¹ *Bealey v. Shaw*, 6 East, 208.

² L. R., 6 Q. B. 586.

³ 5 E. & B. 986.

⁴ 1 B. & A. 258.

afford examples. In the former case, it was held that a right by the owners of the dominant tenement to go from time to time upon the servient tenement for the purpose of diverting the water of a natural stream flowing along it, so as to cause it to pass through that tenement by an artificial cut to the dominant tenement for the purpose of supplying cattle with water, might be inferred from a user of forty years, and that for the interruption of such easement an action was maintainable. The Court further held, that the fact that the water was diverted by means of an artificial cut did not destroy the right of action by the owner of the dominant tenement.

In *Saunders v. Newman*,¹ the plaintiff proved a right to the flow of water to a mill for forty years, which mill was burnt down and another erected in its place, with a wheel of the same dimensions as the former one. Since that time, he had erected a new wheel of different dimensions, and requiring less water. The action was brought for injury to this last wheel by a hatch dam or mill head of defendants being raised to a greater height than it had formerly been, and the Court held that the right of action which the plaintiff had for an interference with a stream which had immemorially flowed to his mill, was not destroyed by the alteration of the wheel. "If," says Bayley, J., "a person stops the current of a stream which "has immemorially flowed in a given direction, and "thereby prejudices another, he subjects himself to an "action."

Where, however, an easement has been acquired, the diversion or obstruction cannot be materially altered or increased to the further detriment of the servient owner. Thus in the case of *Bealey v. Shaw*² it was held, that where a mill owner had acquired a right by twenty years' uninterrupted user to divert a part of a stream for the use of his mill, he was liable to an action at the suit of a lower

Diversion or obstruction cannot be materially increased.

¹ 1 B. & A. 258.

Hill, 5 B. & A. 1; *Alder v. Savile*,

² 6 East, 208; see also *Mason v.* 5 Taunt. 424.

mill owner for a further subsequent diversion to the lower mill owner's injury. So in *Brown v. Best*,¹ where defendant had enlarged certain ancient pits by which he had a right to divert water, and thereby damaged the plaintiff,—it was held that he might have cleaned the pits, but could not enlarge them.

A mere alteration does not destroy the right.

A mere alteration in the mode of enjoyment, as the change of a mill from a fulling to a grist mill or the like, whereby no injury is caused to the servient heritage,² or a trifling alteration in the course of a watercourse, does not destroy the right. Thus in *Hall v. Swift*³ it appeared that plaintiff had, three years ago, slightly altered the course of a stream, which flowed from lands of defendant through a spout and across a lane to plaintiff's land. The stream had formerly run a few yards down the road before it crossed to plaintiff's land, but the plaintiff altered it so as to make it run straight from the spout to his premises. The Court held this alteration did not destroy the plaintiff's right of action for obstruction of the stream by defendant.

Easement of pollution.

A right to pollute the waters of a natural stream is an easement within the Prescription Act, and may be acquired, like any other easement, by user.⁴

Thus a claim to let off upon neighbouring land water from pits impregnated with metallic substances, and thereby rendered noxious, may be acquired by forty years' user under the Prescription Act.⁵ So a right to use a natural stream for the purpose of washing ore and carrying away sand, stones, rubble, and other stuff dislodged and severed from the soil in working a mine, may be claimed by prescription or custom.⁶

¹ 1 Wils. 174.

² *Luttrell's case*, 4 Rep. 86.

³ 6 Scott, 167; 4 Bing. N. C. 381. As to effect of alteration on the easement of light, see *Barnes v. Loach*, 4 Q. B. D. 494; *Tapling v. Jones*, 11 H. L. 290; *National Plate Glass Co. v. Prudential As-*

surance Co., 6 Ch. D. 757; *Blanchard v. Bridges*, 4 A. & E. 176; *Ellis v. Manchester*, 2 C. P. D. 13.

⁴ *Wood v. Waud*, 3 Ex. 748.

⁵ *Wright v. Williams*, 1 M. & W. 77.

⁶ *Carlyon v. Lovering*, 1 H. & N. 797; see also *Crossley v. Light-*

Such a right to pollute a stream can only be gained by a continuance of a perceptible amount of injury to the servient tenement for twenty years. Thus in *Murgatroyd v. Robinson*,¹ where an action was brought by the owner of a mill, which of right ought to be supplied with a flow of water from a pool on the river Calder, against the owner of works higher up the stream, for placing cinders, &c. at his works so as to fall into the Calder, whence they were carried down to plaintiff's mill pool and filled it up, and the defendant pleaded that the occupiers of his works had for more than twenty years placed cinders, &c. on the banks of the stream and its channel, the Court held the plea bad, as not showing that the defendant had, during twenty years, of right caused the refuse to go into plaintiff's pool; as till the occupiers of the mill sustained some damage from defendant's user, no right as against them began to be acquired.²

In *Goldsmid v. Tunbridge Wells*,³ where an injunction was granted to restrain the draining of a town into a stream passing through the plaintiff's lands, the defendants proved that the sewage of the town had always flowed into the stream, and, on that ground, set up a prescriptive right to continue the discharge. It was, however, proved that though some sewage did formerly flow, and for fifty years had flowed into the brook, that, nevertheless, about ten years ago the water was pure and fit for domestic use, and that the pollution had since then gradually increased. Under these circumstances Sir J. Romilly, M. R., held, the prescriptive right was not proved, and granted the relief prayed. "My opinion is," says the learned judge, "that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into

owler, L. R., 3 Eq. 279; 2 Ch. 478; *Baxendale v. McMurray*, L. R., 2 Ch. 790; *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Moore v. Webb*, 1 C. B., N. S. 673.

¹ 7 Ell. & Bl. 391.

² See *Flight v. Thomas*, 10 A. & E. 590.

³ L. R., 1 Ch. 352; L. R., 1 Eq. 161; see also *Sampson v. Hod-dinot*, ante, p. 237.

“that watercourse, has a right to come to the Court of Chancery to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him.” The case was affirmed on appeal,¹ Turner, L. J., remarking with regard to the claim of prescriptive right, “I assume, but without meaning to give any opinion on the point, that such a right might well be acquired, but then I think it could be acquired only by a continuance of discharge of the sewage prejudicially affecting the estate, at least, to some extent, for the period of twenty years; and I think the evidence sufficiently shows that the discharge has not prejudicially affected the estate for so long a period.”

Fouling must not be considerably increased.

Where a right to pollute a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of the servient tenement, but the user which originated the right must also be its measure.²

In an action for polluting a stream, where a prescriptive right to do so is claimed, it is for the jury to say whether the right claimed is an immemorial and unlimited right of polluting the stream, or the more limited right of doing so for the purposes of a business as carried on for more than twenty years.³

Thus, in the case of *A.-G. v. Borough of Birmingham*,⁴ it was proved that, before the passing of the Birmingham Improvement Act, the drainage of the town and neighbourhood was chiefly effected by various small sewers, which flowed into the Rea, a tributary of the Tame; and that the sewage, owing to the distance it had to travel, and to its flowing through a variety of small outlets, became

¹ L. R., 1 Ch. 349.

² *Crossley v. Lightowler*, L. R., 2 Ch. 478.

³ *Moore v. Webb*, 1 C. B., N. S. 673; see *Rochdale Canal v. Radcliffe*, 18 Q. B. 287.

⁴ 4 Kay & J. 528; see *ante*, p. 162.

gradually purified by filtration, before it reached the estates of the plaintiff, a riparian owner, about seven miles off, so that the waters were well filled with fish, and could be used for brewing and domestic purposes. After the passing of the Act before mentioned, which incorporated the Towns Improvement Act, the 107th sect. of which Act provides, that nothing therein shall render lawful any act, which, but for the Act, would be a nuisance; the whole of the sewage was discharged by a main sewer into the Tame at the point where it was joined by the Rea, and the effect of this was to pollute the river Tame downwards to and beyond the plaintiff's estate, to such an extent that the fish died, and cattle could no longer drink of the water. On an information at the relation of the plaintiff, Wood, V.-C., held, that though the council of the borough were bound by their local act to drain the town, they were not justified in so doing in increasing the nuisance to the extent proved. With regard to the prescriptive right claimed, the learned Vice-Chancellor says, "It was argued that the inhabitants of Birmingham had a right to drain their houses into the Rea, and thence into the Tame; but this, at least, is in evidence, that the alleged right, as exercised (assuming it to be a right), did not pollute the water of the Tame as it does now; did not kill the fish, or prevent the cattle from drinking of the river; but immediately the defendants' sewers were opened, the fish were killed in the river, and the cattle would no longer drink of it; and their cause and effect are clearly pointed out. The same sort of argument was addressed to me in the *Luton case*.¹ There it was contended, and in fact the plaintiff admitted, that the inhabitants had a right to open their sewers into the river; and the defendants, acting on behalf of the community, claimed to exercise all the rights which its several members possessed. But the

¹ *A.-G. v. Luton*, 2 Jur., N. S. 180; see *A.-G. v. Kingston*, 13 W.R. 888.

“ answer is this. The right thus claimed is like that
 “ which exists in the case of adjoining mines upon dif-
 “ ferent levels. From the necessity of the case, every
 “ owner of a mine must submit to the inconvenience of
 “ having the water of an adjoining mine upon a higher
 “ level descend upon his mine, so long it descends in the
 “ natural course of drainage; but that does not entitle the
 “ owner of the adjoining mine to throw upon him, in
 “ some other and more objectionable way, water which
 “ might be allowed to descend upon him in a modified
 “ form, not occasioning the same amount of injury to his
 “ property. So here, before the defendants’ operations,
 “ the drainage of Birmingham, entering the river in
 “ dribblets, and at different parts of the stream, was largely
 “ diluted before it reached the plaintiff’s property, and
 “ did not subject him to that inconvenience of which he
 “ now complains.”¹ The learned Vice-Chancellor also
 held, that the fact that a vast population would suffer if
 the town remained undrained, and unless the rights of the
 plaintiff were invaded, was one which the Court could not
 take into consideration;² and that though the plaintiff had
 submitted to the injury for four years, trusting to the
 assurances of the defendants that it would be remedied,
 he was not precluded from relief.³

A mere
change in the
quality of
pollution does
not destroy
the easement.

As in the case of diversion and obstruction, a mere
change in the quality of the polluting discharge not in-
creasing, as against the servient tenement, to any sub-
stantial or tangible degree the amount of pollution, does
not destroy the easement. In the case of *Baxendale v.*
McMurray,⁴ the defendant, the owner of an ancient paper-
mill, where paper had been made of rags, introduced a

¹ See also *Moore v. Webb*, 1 C. B., N. S. 673; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Kingston*, 13 W. R. 888; *A.-G. v. Halifax*, 39 L. J., Ch. 129; *A.-G. v. Luton*, 2 Jur., N. S. 180; *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 345; *Cator v. Lewisham*, 11 Jur., N. S. 340.

² See also *Pennington v. Brinsop Hall Co.*, 5 Ch. Div. 769, and *ante*, p. 158 *et seq.*

³ See as to this, *A.-G. v. Leeds*, L. R., 5 Ch. 594, per Lord Hatherley, L. C.

⁴ L. R., 2 Ch. 790; see also *A.-G. v. Nichol*, 16 Ves. 338.

new vegetable fibre, and carried on the works on the same scale for making paper from this new material. For more than twenty years before this change, the refuse arising from the paper manufacture had been discharged into the stream which ran past plaintiff's house. The Lords Justices held, reversing a decree of Stuart, V.-C., that the easement to which defendant was entitled was to be presumed to be, not a right to foul the stream by discharging into it washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using only proper materials for the purpose, but not increasing the pollution, and that the *onus* lay on the plaintiff to prove any increase of pollution.

The right to discharge water over the lands of others, or to receive the discharge of water from the lands of others by means of watercourses artificially created, is obviously not a natural right of property, but is the subject-matter of contract between the parties. As such it may be established, like any other easement, either by express grant, or by prescription which presumes a grant. Such right may obviously be created for the sole benefit of the person discharging the water, or for the sole benefit of the person receiving the discharge, or for the mutual benefit of both. Where the right is created by express contract, the rights of the various parties will be regulated by the words of the deed¹ creating the right. Where it depends on prescription, the user which originated the right must also be its measure.²

Although no action will lie, by a riparian owner on the banks of an artificial watercourse, for its diversion or obstruction, merely as an incident to the property through which it passes,³ yet there is no doubt that the long-con-

Easement of artificial watercourse.

Rights in may be acquired by grant or prescription.

¹ See *Sharp v. Waterhouse*, 3 Jur., N. S. 1022.

² *Crossley v. Lightowler*, L. R., 2 Ch. 478.

³ See *ante*, p. 106.

tinued submission of a servient owner to the discharge of water upon his tenement, or to the conducting it through his land by the owner of the dominant tenement, will confer a right to continue the discharge of water, or to continue to receive the supply of it through the land of the servient owner.¹ An artificial watercourse may, moreover, have been originally made under such circumstances, and have been so used as to give all rights that a riparian proprietor would have had, had it been a natural stream.² “There is no doubt,” says Sir Montagu Smith, delivering the judgment of the Judicial Committee of the Privy Council in a late Indian Appeal,³ “that the right to the “water of a river flowing in a natural channel through a “man’s land, and the right to water flowing to it, “through an artificial watercourse constructed on his “neighbour’s land, do not rest on the same principles. “In the former case each successive riparian proprietor “is, *primâ facie*, entitled to the unimpeded flow of the “water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident “to his ownership of it. In the latter, any right to the “flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the “owners of the lands from which the water is artificially “brought, or on some other legal origin. The above distinction seems to be now clearly established; for, “although it was said by the Court of Queen’s Bench “in the case of *Magor v. Chadwick*,⁴ that it was no misdirection to tell the jury ‘that the law of watercourses “is the same, whether natural or artificial,’ it was held in “a subsequent case, which appears to their lordships to “be correctly decided—*Wood v. Waud*⁵—that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would

Rameshur
Pershad Singh
v. Koonj
Behari
Pattuk.

¹ Gale, p. 296.

² *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; 32 L. J., Q. B. 136.

³ *Rameshur Pershad Singh v.*

Koonj Behari Pattuk, 4 App. Cas. 121, 126.

⁴ 11 A. & E. 586.

⁵ 3 Ex. 748; 18 L. J., Ex. 305.

“ be too broad ; on the other hand, it appears to their
 “ lordships that the proposition that a right to the use of
 “ water flowing through an artificial channel cannot be
 “ presumed from the time, manner, and circumstances of
 “ its enjoyment, is equally too broad and untenable. It was
 “ said by the Court in *Wood v. Waud*¹—‘ We entirely
 “ ‘ concur with Lord Denman, C. J., that “ the proposition
 “ ‘ that a watercourse of whatever antiquity, and in what-
 “ ‘ ever degree enjoyed by numerous persons, cannot be
 “ ‘ enjoyed so as to confer a right to the use of the water,
 “ ‘ if proved to have been originally artificial, is quite inde-
 “ ‘ fensible ;’ ” but, on the other hand, the general proposi-
 “ ‘ tion that, *under all circumstances*, the right to water-
 “ ‘ courses, arising from enjoyment, is the same, whether
 “ ‘ they be natural or artificial, cannot possibly be sus-
 “ ‘ tained. The right to artificial watercourses, as against
 “ ‘ the party creating them, surely must depend upon the
 “ ‘ character of the watercourse, whether it be of a perma-
 “ ‘ nent or temporary nature, and upon the circumstances
 “ ‘ under which it is created. The enjoyment for twenty
 “ ‘ years of a stream diverted or penned up by permanent
 “ ‘ embankments, clearly stands upon a different footing
 “ ‘ from the enjoyment of a flow of water originating in the
 “ ‘ mode of occupation or alteration of a person’s property,
 “ ‘ and presumably of a temporary character, and liable to
 “ ‘ variations.’ In a case which occurred soon after this
 “ decision, *Greatrex v. Hayward*,² Baron Parke shortly
 “ states the principle thus—‘ The right of the party to an
 “ ‘ artificial watercourse, as against the party creating it,
 “ ‘ must depend upon the character of the watercourse and
 “ ‘ the circumstances under which it was created.’ In the
 “ case, then, in question, the Court considered that the
 “ watercourse was of a temporary nature only, and that
 “ no right had been acquired by an enjoyment of twenty
 “ years.

“ In a subsequent case the Court of Queen’s Bench

¹ 3 Ex. 777.

² 8 Ex. 293.

“ directed a new trial, on the ground that the jury might
 “ have been misled by the direction of the learned judge
 “ who tried the cause, to the effect that if the stream were
 “ an artificial one, no right whatever could have been
 “ acquired in it. The Court held the direction was in-
 “ correct,—‘because’ (in the words of the Court) ‘although
 “ ‘ it may have been an artificial watercourse, it may still
 “ ‘ have been originally made under such circumstances,
 “ ‘ and have been so used, as to give all the rights that
 “ ‘ the riparian proprietors would have had, had it been a
 “ ‘ natural stream:’ *Sutcliffe v. Booth*.”¹

Pollution of
 artificial
 watercourses.

With regard to the question of pollution, the law would appear to be somewhat unsettled; for while in the cases of *Magor v. Chadwick*² and *Wood v. Waud*³—to be considered hereafter—the Courts were of opinion that even in cases where from the circumstances a riparian owner may have no right to compel the continuance of an artificial watercourse, he may have a right to prevent the pollution of it while it continues to run, on the ground that no man can have a right to send dirty water on another’s land, unless he can prove a prescriptive right so to send dirty water;⁴ on the other hand, it has been held in subsequent cases that the mere possession of water, not of right, but by permission or grant from a riparian owner, would not entitle the licensee to maintain an action for diversion or pollution against a wrongdoer.⁵

Diversion of
 natural
 stream by
 artificial
 means.

Where a natural stream having a natural source is diverted by artificial means without injury to the rights of others, the riparian owners who would have had rights on the natural course of the stream do not lose those natural rights from the fact that the water so diverted flows in an artificial channel.⁶ Where, however, such

¹ 32 L. J., Q. B. 136.

² 11 A. & E. 571.

³ 3 Ex. 748; see also *Sutcliffe v. Booth*, 32 L. J., Q. B. 136.

⁴ As to this, see *Cawkwell v. Russell*, 26 L. J., Ex. 34.

⁵ *Whaley v. Laing*, 3 H. & N. 476, 675, 901; *Stockport v. Potter*,

3 H. & C. 300; *Crossley v. Lightowler*, L. R., 2 Ch. 478; see also *Hodgkinson v. Ennor*, 4 B. & S. 229; and see *ante*, Ch. III., p. 153 *et seq.*, where the question is fully discussed.

⁶ *Nuttall v. Bracewell*, L. R., 2 Ex. 1; *Stockport v. Potter*, 3 H. &

artificial channel is carried across the lands of others, all rights to it, as between the owner through whose land it passes and the owner for whose benefit it flows, will be regulated by the laws of artificial watercourses, as stated in this chapter.

The right to discharge water on another's land is recognized in the case of *Wright v. Williams*,¹ where it was held that a right to let off water from pits impregnated with a poisonous substance upon the land of another, might be acquired by user under the Prescription Act; and in *Cawkwell v. Russell*,² where it was held that proof of a prescriptive right to send ordinary refuse water into another's drain would not justify the dominant owner in sending the foul water and filth from his privies into that drain, but that the right as claimed must be proved by grant or user.

Easement to discharge water.

The right to receive the flow of water from another's land is exemplified in the case of *Ivimey v. Stocker*,³ where it was proved that the water of an artificial watercourse had been used from before the time of living memory by tin-bounders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds. In 1856, the tin-bounders abandoned the mine; since which time the plaintiffs, the owners of the soil, had been in possession. A bill by the owners of the soil to restrain the diversion of this watercourse by the owner of the land on which it rose was dismissed by the Vice-Chancellor, on the ground that there was no privity of estate between the

Easement to receive flow of water.

C. 300, see *ante*, p. 122 *et seq.*; *Beeston v. Weate*, 5 E. & B. 986; see, however, *Crossley v. Lightowler*, L. R., 2 Ch. 478.

¹ 1 M. & W. 77.

² 26 L. J., Ex. 34.

³ L. R., 1 Ch. 396. As to custom of tin bounding, see *Rogers on Mines*, 347; *Rogers v. Brenton*,

10 Q. B. 26, 50; *Gaved v. Martyn*, 34 L. J., C. P. 353; *Rex v. Baptist Mill Co.*, 1 M. & S. 612; *Rex v. St. Austell*, 5 B. & A. 693; *Goodday v. Michel*, Cro. Eliz. 441; *Crease v. Saul*, 2 Q. B. 862; *Vice v. Thomas*, cited in 2 Q. B. at p. 880.

owner of the soil and the bounders, and that the owner could not, therefore, claim an easement by prescription on the ground of their enjoyment of it. The Court of Appeal reversed this decision, and granted the injunction prayed, holding that from the proof of user beyond living memory of the water for the purpose of working the mines, there was an irresistible presumption, even independently of the statute 2 & 3 *Will. IV. c. 71*, that the owners of the mines had, either by prescription or grant, acquired a right to the easement claimed, and that this presumption was not rebutted by the fact that the mines had been worked by the tin-bounders.

In the Irish case of *Powell v. Butler*,¹ it was held that where plaintiff had for twenty years used an artificial watercourse, made for the benefit of all the persons by or through whose land the water was caused to flow, he had acquired a right to the flow of it from and through defendant's lands above, and could maintain an action for the diversion of it.

Right of
servient
owner to com-
pel dominant
owner to con-
tinue dis-
charge of
water,

“A question of much greater difficulty,” says Mr. Gale, “arises in the case of a discharge of water when the servient owner seeks to compel the dominant owner to continue it, and to prevent him from altering its course, and thus attempts to invert their relative positions, and himself to become dominant. The chief objection is, that there is no submission (*patientia*) by the dominant owner to the enjoyment of the water by the servient,—he discharges the water for his own convenience, and to what use the other may apply it when so discharged is immaterial to him,—he has no means of preventing such an application but by discontinuing the discharge, and thus depriving himself of the use of his own easement. Supposing it to be unknown by which party the flow of water was caused, and that the flow is beneficial to the owners of both tenements,—to the one by the discharge—to the other by the use to which he

¹ Ir. R., 5 C. L. 309.

“ puts the water on receiving it,—it would probably be
 “ presumed that a reciprocal easement did exist.”¹

This question has been elaborately discussed in a series of considered judgments, and as the point is a most important one, involving a consideration of the whole law of artificial watercourses, it will be well to discuss the various cases at some length. and rights on artificial watercourses generally.

In the case of *Gaved v. Martyn*,² an action was brought for obstructing the plaintiff, the occupier of certain clay works, in his right to certain artificial watercourses. The first watercourse had been made originally by his predecessor in title with the licence of the proprietor of land on a natural stream from which the water was derived, and the Court held that this was not such an enjoyment as of right as to entitle him to claim a prescriptive right to its flow from an uninterrupted user of twenty years. The second watercourse had been made by plaintiff in defendant's land, and had been enjoyed, adversely, for twenty years. The Court held he was entitled to sue for the interruption of it, and that his right was not destroyed by the fact that the land in which the water had its source was, by the custom of Cornwall, subject to the rights of tin-bonders to use the water, if they chose, for until they chose to exercise their rights, the general law of the land applied to Cornwall as to any other county. The third watercourse was made by miners, under whom the defendant claimed for the purpose of draining their mines; and the Court held that the evidence showed that the miners had not abandoned their control of the stream, and that, therefore, no rights could be acquired over it by prescription. *Gaved v. Martyn.*

The law with regard to artificial watercourses is thus stated by Erle, C. J., delivering the opinion of the Court of Common Pleas. “ Rights and liabilities in respect of
 “ artificial streams, when first flowing on the surface, are

¹ Gale on Easements, p. 298.

² 19 C. B., N. S. 732; 14 W. R. 62.

“ entirely distinct from rights and liabilities in respect of
“ natural streams so flowing. The water in an artificial
“ stream flowing in the land of the party by whom it was
“ caused to flow, is the property of that party, and is not
“ subject to any rights or liabilities in respect of other per-
“ sons. If the stream so brought to the surface is made
“ to flow upon the land of a neighbour without his consent,
“ it is a wrong for which the party causing it so to flow is
“ liable. If there is a grant by the neighbour, the terms
“ of the grant regulate the rights and liabilities of the
“ parties thereto. If there is uninterrupted user of the
“ land of the neighbour for receiving the flow as of right
“ for twenty years, such user is evidence that the land,
“ from which the water is sent into the neighbour’s land,
“ has become the dominant tenement, having a right to
“ the easement of so sending the water, and that the
“ neighbour’s land has become subject to the easement of
“ receiving that water. But such user of the easement of
“ sending on the water of an artificial stream, is, of itself,
“ no evidence that the land from which the water is sent
“ has become subject to the servitude of being bound to
“ send on the water to the land of the neighbour below.
“ The enjoyment of the easement is, of itself, no evidence
“ that the party enjoying it has become subject to the
“ servitude of being bound to exercise the easement for
“ the benefit of the neighbour. A right of way is no
“ evidence that the party entitled thereto is under a duty
“ to walk ; nor a right to eaves-dropping on the neighbour’s
“ land, that the party is bound to send on his rain water
“ to that land. In like manner, we consider that a party
“ by the mere exercise of a right to make an artificial
“ drain into his neighbour’s land, either from mine or sur-
“ face, does not raise any presumption that he is subject
“ to any duty to continue his artificial drain, though there
“ may be additional circumstances by which that presump-
“ tion would be raised or the right proved. Also if it be
“ proved that the stream was originally intended to have

“ a permanent flow, or if the party by whom or on whose
 “ behalf the artificial stream was caused to flow is shown
 “ to have abandoned permanently, without intention to
 “ resume the works by which the flow has ceased and
 “ given up all rights to and control over the stream, such
 “ stream may become subject to the laws relating to
 “ natural streams. The law relating to natural streams is
 “ entirely different. The flow of a natural stream creates
 “ natural rights and liabilities between all the riparian
 “ proprietors along the whole of its course. Subject to
 “ reasonable use by himself, each proprietor is bound to
 “ allow the water to flow on without altering the quantity
 “ or quality. These natural rights and liabilities may be
 “ altered by grant or by user of an easement to alter the
 “ stream, as by diverting or fouling or penning back, or
 “ the like. If the stream flows at its source by the opera-
 “ tion of nature,—that is, if it is a natural stream, the
 “ rights and the liabilities of the party owning land at its
 “ source are the same as those of the proprietors in the
 “ course below. If the stream flows at its source by the
 “ operation of man,—that is, if it is an artificial stream,
 “ the owner of the land at its source or the commencement of
 “ its flow, is not subject to any rights or liabilities towards
 “ any other person in respect of the water of the stream.
 “ The owner of such land may make himself liable to
 “ duties in respect of such water by grant or contract; but
 “ the party claiming a right to compel performance of
 “ those duties must give evidence of such rights beyond
 “ the mere suffering by him of the servitude of receiving
 “ such water.”

In the case of *Mason v. Shrewsbury Railway*,¹ Cockburn, *Mason v. Shrewsbury Rail.*
 C. J., states his opinion, that in no case can the owner of
 a servient tenement acquire, by the mere existence of the
 easement, a right as against the owner of the dominant
 tenement to continue the diversion of a stream. “ Now

¹ L. R., 6 Q. B. 578; see *Staffordshire Canal v. Birmingham*, L. R.,
 1 H. L. 254.

“ it is of the essence of such an easement,” he says, “ that
 “ it exists for the benefit of the dominant tenement alone.
 “ Being in its very nature a right created for the benefit
 “ of the dominant owner, its exercise by him cannot
 “ operate to create a new right for the benefit of the
 “ servient owner. Like any other right, its exercise may
 “ be discontinued, if it becomes onerous, or ceases to be
 “ beneficial to the party entitled. An easement like the
 “ present, while it subjects the owner of the servient tene-
 “ ment to disadvantage, by taking from him the use of the
 “ water, for the watering of his cattle, the irrigation of
 “ his land, the turning of his mill or other beneficial use
 “ to which water may be applied, may, on the other hand,
 “ no doubt, be attended incidentally with equal or greater
 “ advantage to him,—as, for instance, by rendering him
 “ safe from the danger of inundation. But this will give
 “ him no right to insist on the exercise of the easement
 “ on the part of the dominant owner, if the latter finds it
 “ expedient to abandon his right. In like manner where
 “ the easement consists in the right to discharge water
 “ over the land of another, though the water may be
 “ advantageous to the servient tenement, the owner of the
 “ latter cannot acquire a right to have it discharged on to
 “ his land, if the dominant owner chooses to send the
 “ water elsewhere, or apply it to other purposes. And
 “ upon this principle, as it appears to me, might the case
 “ of *Wood v. Waud* have been decided without reference
 “ to the Prescription Act (2 & 3 Will. IV. c. 71), or to
 “ the question as to whether there had been enjoyment
 “ ‘ as of right,’ so as to satisfy that statute. I prefer to rest
 “ my judgment on the principle—as it appears to me, a
 “ fundamental one—that an easement exists for the benefit
 “ of the dominant owner alone, and that the servient
 “ owner acquires no right to insist on its continuance, or
 “ to ask for damages on its abandonment.”¹

Arkwright v.
Gell.

In *Arkwright v. Gell*, the plaintiffs were owners of

¹ Cf. per Erle, C. J., in *Gaved v. Martyn*, 19 C. B., N. S. 732.

certain cotton mills erected in 1772, and worked by the united force of a natural stream, and of an artificial sough which had been made previous to that date by a mining company, for the purpose of draining their mines. Subsequently another sough was made at a lower level, by another mining company, of whom the defendants were the representatives, by the permission of the owners of the mines, by whom the former sough was made. The effect of this second sough was, in 1836, to drain away and divert the water from the first made sough, to the injury of the plaintiff's mills. The Court held, that the defendants were in the same position in respect to the diversion of the water, as if they had been the owners of the mine drained by the first sough, and were proceeding to unwater a further portion of their mine by a new sough; and that as the stream was not a natural watercourse, but an artificial one of a temporary character, having its continuance only whilst the convenience of the mine owners required it, and made with the sole object of getting rid of a nuisance to the mines, and as, moreover, the plaintiff was aware of the temporary character of the watercourse, he had acquired no right of action for the diversion of it.

In the case of *Magor v. Chadwick*,¹ the plaintiffs complained of the pollution of a stream running to their brewery. This stream flowed from the mouth of an adit or underground passage in adjoining lands not belonging to the plaintiffs, which had been originally made more than fifty years ago by the owner of a mine for the purpose of draining it—but the mine had not been worked for thirty years. After the working had been discontinued, the plaintiffs had used for twenty years pure water from the adit for brewing. The defendants, owners of other mines, subsequently used the adit for draining their mines, and so made the water foul and unfit for brewing.

*Magor v.
Chadwick.*

¹ 11 A. & E. 571; see remarks of Erle, C. J., on this case in *Gaved v. Martyn*, 19 C. B. (N. S.), ante, p 253.

The learned judge at the trial told the jury that, in the absence of custom, artificial watercourses were not distinguished in law from natural; that the same rules of law applied to them; and that twenty years' enjoyment might warrant them in finding in favour of the right. The jury found for plaintiff, and the Court of Queen's Bench refused to grant a new trial, holding that there was no misdirection by the learned judge.

Wood v.
Waud.

In the case of *Wood v. Waud*,¹ the Court of Exchequer laid down in an elaborate judgment the law affecting artificial watercourses, and the rights of riparian owners thereon. In that case, the waters from the workings of a colliery (partly pumped up and partly caused by the overflow of an old coal pit which had become filled with water) had for more than twenty years flowed through two artificial subterraneous channels, one of which, called the Bowling Sough, passed directly through the plaintiff's land; the other, called Low Moor Sough, passed into a natural stream called the Bowling Beck, which, so augmented, passed through the plaintiff's land. Plaintiff had used the water of the soughs for about ten years. The defendant having works on the banks of each channel above the points where they respectively arrived at the plaintiff's land, and at the Bowling Sough, diverted the water of each of them. The channels were subterraneous; but the Court determined the question as it would have done if they had been surface streams, and held that the plaintiff could not recover for the diversion. "This question," says Pollock, C. B., delivering the judgment of the Court, "is not with respect to the rights of the plaintiffs "as against the owners of the collieries which the soughs "relieve from water, but as to the rights of the plaintiffs "and defendants *inter se*; and it will be better to consider, "in the first place, how they would stand if the streams "were not underground. With respect to a claim of "right as against the colliery owners, if it be true that a "right was gained to these streams by the riparian pro-

¹ 3 Ex. 748.

prietors as against them, in consequence of their acquiescence for twenty years, by virtue of the presumption of a grant, or of Lord Tenterden's Act (2 & 3 Will. IV. c. 71), there would be no difficulty as to the right of the riparian proprietors against each other, or against other persons. But Mr. Cowling admitted that a grant could not be presumed, and that he should have great difficulty in establishing the right under Lord Tenterden's Act. This Court, as then constituted, much considered that subject in the case of *Arkwright v. Gell*. We have again considered it, and are satisfied that the principles laid down, as governing that case, are correct, and were properly acted upon in it, by deciding that no action lay for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character, and where the interruption was by the party who stood in the situation of the grantor. The Court of Queen's Bench, in the subsequent case of *Magor v. Chadwick*, supported a verdict for the plaintiff, for the disturbance of a right to the enjoyment of a stream, under circumstances somewhat similar; but in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor anyone claiming under him; and he had not put an end to it by altering the mode of working of his mines, but what is more important, the action was not brought for abstracting, but for fouling—a species of injury which does not stand on the same footing; for though the possessor of the mine might stop the stream, it does not follow that he or any other could pollute it whilst it continued to run; and besides, from the course which the cause took at *Nisi Prius*, the precise question which we have now to consider does not appear to have called for decision. The two cases are therefore distinguishable, and the expressions used by the learned judges in that case, as to

“ the similarity of natural and artificial streams, are to be
 “ understood as applicable to that particular case. We
 “ entirely agree with Lord Denman, C. J. (in *Magor v.*
 “ *Chadwick*), that the proposition that a watercourse, of
 “ whatever antiquity, and in whatever degree enjoyed
 “ by numerous persons, cannot be enjoyed so as to confer
 “ a right to the use of the water, if proved to have been
 “ originally artificial, is quite indefensible;¹ but, on the
 “ other hand, the general proposition, that, under all
 “ circumstances, the right to watercourses arising from
 “ enjoyment is the same, whether they be natural or
 “ artificial, cannot possibly be sustained. The right to
 “ artificial watercourses against the party creating them,
 “ surely must depend upon the character of the water-
 “ course, whether it be of a permanent or temporary
 “ nature, and upon the circumstances under which it was
 “ created. The enjoyment for twenty years of a stream
 “ diverted or penned up by permanent embankments,
 “ clearly stands upon a different footing from the enjoy-
 “ ment of a flow of water originating in the mode of
 “ occupation or alteration of a person’s property, and
 “ presumably of a temporary character, and liable to
 “ variation.

“ The flow of water for twenty years from the eaves of
 “ a house could not give a right to the neighbour to insist
 “ that the house should not be pulled down or altered, so
 “ as to diminish the quantity of water flowing from the
 “ roof. The flow of water from a drain for the purposes
 “ of agricultural improvements for twenty years could not
 “ give a right to the neighbour, so as to preclude the
 “ proprietor from altering the level of his drains for the
 “ greater improvement of his land. The state of cir-
 “ cumstances in such cases shows that one party never
 “ intended to give, nor the other to enjoy, the use of the
 “ stream as a *matter of right*.”¹

¹ See *Greatrex v. Hayward*, 8 Ex. 291; *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; 32 L. J., Q. B. 136.

The right to discharge rain-water from the roof of a house, either by means of a spout, or by drip, which is a nuisance in the absence of a prescriptive right, may be acquired by user, and is not destroyed by a mere alteration in the height of the eaves not increasing the burthen on the servient tenement.¹ No corresponding right to the flow of rain-water *from* the roof of a house can be acquired by prescription.²

Extinguishment of Easements of Water.

"The modes by which easements may be lost," says Gale,³ "correspond with those already laid down for their acquisition. 1. Corresponding to the express grant is the express renunciation. 2. To the disposition by the owner of two tenements, the merger by the union of them. 3. To the easement of necessity, the permission to do some act which of necessity destroys it. 4. And to the acquisition by prescription, abandonment of user."⁴

An express release at law to be effectual must be by deed, but in equity an easement may be lost by agreement or acquiescence.⁵

Easements are also extinguished by operation of law if

¹ *Harvey v. Walters*, L. R., 8 C. P. 162; *Thomas v. Thomas*, 2 C. M. & R. 34; 1 Gale, 61; see Gale on Easements, p. 613; and *ante*, Chap. III. p. 133.

² *Wood v. Waud*, *supra*; *Greatrex v. Hayward*, 8 Ex. 291.

³ Gale on Easements, p. 578, 5th edit.

⁴ Where an easement is granted for a particular purpose by Act of Parliament, the easement ceases when the particular purpose is accomplished. Thus, where a canal company, who had a right to take water for a canal, were recon-

stituted a railway company by Act of Parliament, it was held that they could not grant away their right to the water, for as they had ceased to require it for their canal, the right to take it ceased; *National Manure Co. v. Donald*, 4 H. & N. 8; 28 L. J., Ex. 185.

⁵ Gale on Easements, p. 578; Goddard on Easements, p. 367; see *Fisher v. Moon*, 11 L. T., N. S. 623; *Waterlow v. Bacon*, L. R., 2 Eq. 514; *Johnson v. Wyatt*, 9 Jur., N. S. 1334; *Davies v. Marshall*, 10 C. B., N. S. 697; *Soloman v. Glover*, 10 W. N. 117; and *ante*, p. 204.

the seisin of the dominant and servient tenements are united in one and the same person.¹ Unity of possession only suspends an easement,—it requires unity of seisin to destroy it.²

A natural right to water coming from another tenement is not destroyed by unity. “There is a difference,” says Whitelock, J., in *Sury v. Piggott*,³ “between a way or common and a watercourse. These begin by private right, by prescription, by assent as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity; because the greater benefit shall drown the less. A watercourse doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted.”⁴

By licence.

It has already been stated, that a licence by the dominant owner to do an act incompatible with the existence of an easement, may work its extinguishment, even when the licence is by parol.⁵

Abandonment
of enjoyment.
By nonuser.

The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but a long-continued suspension may render it necessary for the person claiming the right to show that some indication was given during the period that he ceased to use the right of his intention to preserve it.⁶ Thus where the owner of an old pond had an acquired right to draw water for it from a well, and had disused the old pond for thirty years, and during that time drew water for three new ponds; it was held that the right to draw water to the old pond was not destroyed, as it was impossible to conceive that he intended

¹ Goddard on Easements, p. 364; Gale, p. 581; see *ante*, p. 215 *et seq.*

² *Thomas v. Thomas*, 2 C., M. & R. 34; *Simper v. Foley*, 2 John. & H. 555; *James v. Plant*, 4 A. & E. 761; Co. Litt. 313 a.

³ 3 Bulst. 339; Poph. Rep. 166.

⁴ See *Bright v. Walker*, 1 C., M. & R. 219; and Goddard on Easements, p. 365.

⁵ *Ante*, p. 208.

⁶ *Crossley v. Lightowler*, L. R., 2 Ch. 478; 3 Eq. 279.

to abandon the right, when he was actually drawing water into three new ponds instead of into the old one.¹ So a right of way along a stream has been held not to be lost if the owner allows part of it to be choked with mud, even though it may be impassable for sixteen years; for the mud may be removed if the way is required.²

Where the dominant tenement is altered in such a way as will make it "incapable any longer of the perception of the particular easement," or where the alterations are of such a permanent character as will evince an intention on the part of the dominant owner to abandon it, the easement will be extinguished, although the abandonment has not existed for twenty years. Thus, in *Crossley v. Lightowler*,³ where the owners of dye works had a privilege or easement of pouring foul dye water into a river, it was held, that though the mere nonuser of this easement was not in itself a proof of abandonment of it, without some evidence of intention to abandon it, yet the nonuser of the mills for twenty years, and the fact that they had been allowed to go to ruin, was sufficient to destroy the right.

An encroachment by the dominant owner, which will render the easement necessarily more onerous to the servient tenement, will have the effect of destroying the easement;⁴ but a mere alteration, causing no injury to the servient heritage, will not destroy the right.⁵

Thus, in *Caukwell v. Russell*,⁶ where the plaintiff had a prescriptive right to send waste water down the defendant's drain, and sent down also foul water from his

¹ *Hale v. Olroyd*, 14 M. & W. 789. See per Wood, V.-C., in *Crossley v. Lightowler*, L. R., 3 Eq. p. 293.

² *Bower v. Hill*, 1 Bing. N. C. 549.

³ L. R., 2 Ch. 478; L. R., 3 Eq. 279; see *Reg. v. Chorley*, 12 Q. B. 518; *Ward v. Ward*, 7 Ex. 838; *Mason v. Hill*, 5 B. & Ad. at p. 16; *Liggins v. Inge*, 7 Bing. 693.

⁴ *Bealey v. Shaw*, 6 East, 208;

Brown v. Best, 1 Wils. 174; *Crossley v. Lightowler*, L. R., 2 Ch. 478; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Kingston*, 13 W. R. 888.

⁵ *Luttrell's case*, 4 Rep. 86; *Hall v. Swift*, 6 Scott, 167, and cases cited *ante*, p. 242; *Harvey v. Walters*, L. R., 8 C. P. 62; *Thomas v. Thomas*, 2 C., M. & R. 34.

⁶ 26 L. J., Ex. 314.

privies, the Court held that defendant had a right to stop the whole drain, as the encroachment could not be prevented in any other way; but in the subsequent case of *Hill v. Cock*,¹ where the plaintiff increased a prescriptive right to water by lengthening a gutter, the defendant was not held justified in stopping this excessive user, by means which altogether prevented plaintiff's enjoyment of the water.

¹ 26 L. T., N. S. 185; see *post*, Ch. X.

CHAPTER V.

OF CANALS, WATER SUPPLY, AND DOCKS.

It is proposed in the present chapter to treat of the rights, duties and liabilities of—I. *Canal Companies*; II. *Water Companies*; and III. *Dock Companies*.

All such bodies are either combinations of adventurers incorporated under Acts of Parliament in order to supply a public want for their own profit, or are public bodies invested with the like powers for the public benefit. In both cases, however, they are but substitutes for individual enterprise.

These bodies are but substitutes for individual enterprise.

“It is well observed,” says Blackburn, J.,¹ “by Mr. Justice Mellor in *Coe v. Wise*,² of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature, they are substitutions on a large scale for individual enterprise. And we think that, in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. If, indeed, the legislature has by express enactment or necessary intendment enacted that they shall not be subject to such a liability, there is an end of the question.”

Since all these bodies are almost universally in- Rights and duties of

¹ Delivering the opinion of the judges in the House of Lords in *Mersey Docks Co. v. Gibb*, L. R., 1

H. L. 93; 11 H. L. Cas. 686.

² 5 Best & Sm. 440; 4 New Rep. 354.

bodies exercising statutory powers.

incorporated by Act of Parliament, and derive all their powers to interfere with the rights of private property from the special enactment creating them, it will be well to note some of the general principles regulating the liability of companies exercising statutory powers.

Where the legislature has authorized certain persons to effect a certain purpose, and has given them the powers necessary to effect it, they may exercise those powers to their full extent without incurring responsibility, but in so doing they must not occasion any needless injury to any one.¹

Where persons are incorporated by Act of Parliament for a particular purpose, and have full powers given them to effect that purpose, if the effecting of it may occasion (not only in the course of originally extending the necessary works for the required purposes, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury.¹

*Geddis v.
Bann Reser-
voir.*

These principles were laid down in the case of *Geddis v. Bann Reservoir*,² which was an appeal heard in the House of Lords against a judgment of the Exchequer Chamber in Ireland, reversing a previous judgment of the Court of Queen's Bench there.

A local Act of Parliament incorporated certain persons for the purpose of securing a regular and proper supply of water to mill-owners whose works were situated on the banks of the river Bann. These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the Bann through the channel of a stream called the Muddock. The second clause of the Act directed them to "make, erect, construct, maintain, repair and "keep" by means of a reservoir a due and adequate

¹ *Geddis v. Bann Reservoir*, 3 App. Cas. 430.

² 3 App. Cas. 430.

supply of water for the river Bann at all seasons of the year; and to enter on the lands of the different streams named, to do what was necessary for the conveyance and due regulations of the supply of such waters, and "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels and watercourses, drains, feeders, weirs, dams," &c. &c. The 82nd clause gave similar directions, and ordered that the surplus water should be returned unto the different streams from which it had been taken; and also made provisions for supplying with water the cattle depasturing in the fields there.

The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, and sent them through the channel of the Muddock, so that at times it overflowed its banks, and did damage to the lands of the adjoining proprietors.

It was held that the order of the Exchequer Chamber should be reversed, and the order of the Court of Queen's Bench restored, and that under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the Act should not be injurious to the lands lying along the banks of the Muddock, and that the bed or channel of the Muddock must be cleansed and kept in a proper state for the flow and re-flow of the water that had to pass through it.

In giving judgment, their lordships distinguished the case from that of *Cracknell v. Mayor and Corporation of Thetford*,¹ which had been cited for the defendants. "In that case," said Lord Hatherley,² "which has been followed by several others, it seems to have been laid down that persons having powers to execute certain works, and executing those works in such a manner as to perform that duty in compliance with an Act of Parliament, and being utterly guiltless of any negligence,

¹ L. R., 4 C. P. 629; see Ch. VII.

² 3 App. Cas. p. 448.

“ cannot be liable to an action. If the person injuriously
“ affected cannot find any clause in the Act of Parliament
“ giving him compensation for the damage which he has
“ received, he cannot obtain compensation for that damage
“ by way of action against the parties who have done no
“ wrong,—that is the simple proposition which is laid
“ down in that case, and when it is expressed in these
“ terms it is impossible for anybody to find any fault with
“ it. As my noble and learned friend (Lord Selborne)
“ has observed, there are other cases far more like this
“ case than that of *The Corporation of Thetford*. In the
“ *Thetford case*¹ what occurred was this: there was a
“ power to a company to facilitate the navigation of a
“ river by means of making certain alterations and im-
“ provements in it; a part of the necessary alterations was
“ the placing of stanchions in the river. When the river
“ was so altered and improved, weeds grew up in it with
“ which the company had nothing to do; they grew up
“ neither more nor less by reason of anything the com-
“ pany had done. It was said that the silting up of the
“ river had been increased by means of those stanchions,
“ but they were necessary to the works and could not be
“ removed; but nothing had been of its own accord done by
“ the company which could be said to be the cause of the
“ injury the plaintiff had sustained. Now in this case we
“ have this state of things. The respondents have the power
“ to execute a work of this description, and to make chan-
“ nels and cuts, and not only so, but they have also the
“ power to widen and deepen cuts and watercourses.
“ Having that power, and having the power of using those
“ watercourses to communicate between the reservoir and
“ the river Bann, they have chosen to exercise that power
“ in a manner injurious to the plaintiff owing to their
“ not having seen, in the first instance, the necessity of
“ making provision for the additional quantities of water
“ that would be sent down, and at the varying periods

¹ L. R., 4 C. P. 629.

“ at which they would be sent down. The defendants
“ neglected to make the provision they should have made
“ for carrying that water off in such a manner as would
“ have prevented the occurrence to the plaintiff of a
“ damage which never had occurred to him before, and
“ which was, as the jury found, attributable to the works
“ so executed. This case is not within the principle of the
“ *Thetford case*,¹ nor within any principle which could be
“ laid down with regard to parties keeping themselves
“ entirely within their powers, and taking care that the
“ powers of an Act of Parliament when exercised shall be
“ exercised in a manner to prevent needless injury. We
“ are not bound nor entitled to suppose that they will
“ wilfully do injury by the exercise of the legislative
“ powers which have been given to them; but it appears
“ to me clearly and plainly that they should use every
“ precaution, by the exercise either of the powers created
“ by the Act of Parliament itself, or of their common law
“ powers, to prevent damage and injury being done to
“ others, through whose property the works or operations
“ are to be carried on, and to avoid subjecting them to
“ consequences which they were not bound to anticipate
“ from the Act of Parliament, seeing that the Act also
“ enabled the parties who had the power to do so to pre-
“ vent the mischief.”

Lord Blackburn in the course of his judgment made the following remarks:² “ It is agreed on all sides that the Act
“ requires the promoters, the defendants, to pour into the
“ channel of the river Muddock as much water as, on the
“ average, used formerly to go. It does not mean that if
“ it happens to be a high flood they are to keep it up to a
“ high flood, or that in summer they are to keep it to a
“ mere trickle if it was a mere trickle before; but it means
“ that on the average it is to be as much as it was before.
“ And they have a permissive power, for the benefit of the
“ mill-owners on the Bann, to send down more water, both

¹ L. R., 4 C. P. 629.

² 3 App. Cas. 455.

“ greater in quantity and in a different way from what
 “ would have gone in the ordinary natural state of things
 “ down the Muddock if the Act had not been passed.
 “ Now, certainly, the result has been that the channel of
 “ the Muddock, as it exists at present, is not able to carry
 “ off the water they have put into it, and if they have no
 “ power to cleanse the channel of the Muddock or to alter
 “ it, which was the view taken by the majority of the
 “ learned judges in the Court of Exchequer Chamber
 “ below, then they are not liable to damages for doing
 “ that which the Act of Parliament authorizes, namely,
 “ pouring part of the water of the reservoir into the
 “ Muddock, that it may go into the Bann. For I take it,
 “ without citing cases, that it is now thoroughly well estab-
 “ lished that no action will lie for doing that which the
 “ legislature has authorized, if it be done without negli-
 “ gence, although it does occasion damage to anyone; but
 “ an action does lie for doing that which the legislature
 “ has authorized, if it be done negligently. And, I think,
 “ that if by a reasonable exercise of the powers, either
 “ given by statute to the promoters, or which they have
 “ at common law, the damage could be prevented, it is
 “ within this rule ‘negligence’ not to make such reasonable
 “ exercise of their powers. I do not think that it will be
 “ found that any of the cases (I do not cite them) are in
 “ conflict with that view of the law.” His lordship then
 went on to state, that the question, therefore, depended on
 whether power was given under the Act to the promoters
 to cleanse the Muddock, and that he was of opinion that
 such power was so given by the provisions of the second
 section, and that the defendants were guilty of negligence
 in not cleansing it.

The principles above laid down are but an affirmation of
 those enunciated in earlier cases.

*Allnutt v.
 Inglis.*

Thus in *Allnutt v. Inglis*,¹ which turned on the rights
 of the London Dock Company, Lord Ellenborough stated

¹ 12 East, 527.

the rule, that where private property is, by consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public, in the exercise of that public interest or privilege conferred for their benefit;¹ and this important general principle was confirmed and extended in the case of *The Mersey Dock Trustees v. Gibb*,² which turned on the liability of the plaintiffs for injuries caused by the negligence of their *employés*; and where it was decided, not only that a private person or a company, having a right to levy tolls in respect of the performance of a particular work, will be liable in damages for injuries occasioned by performing it negligently, but also that a corporate body, authorized to perform such a work, and receiving tolls in respect of it, though obtaining no profit for itself from such tolls, but collecting them for the maintenance of the work, and the possible future benefit of the public, is equally responsible for injuries arising from the improper performance of such work, and the funds thus obtained must discharge that liability. On the appeal to the House of Lords, certain questions relative to the points raised in this case were put to the judges by the Lord Chancellor, and it will be well to quote, in illustration of this subject, some of the remarks of Mr. Justice Blackburn, who delivered their opinion in reply. After approving the doctrine laid down in *Parnaby v. Lancaster Canal*,³ and pointing out the distinction between dock trustees and a canal company, he continued: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided in the statutes authorizing the doing

¹ *Allnutt v. Inglis*, 12 East, 527.

³ 11 Ad. & El. 223; see *post*, p.

² L. R., 1 H. L. 93; 11 H. L. 299.
Cas. 686.

*Mersey Dock
v. Gibb.*

“ of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provisions of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or private profit. No action will lie against railway companies for erecting a line of railway authorized by their Acts, so long as they pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their acts, though one road is made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature (*The King v. Pease*¹). This, we think, is the point decided in *The Governors of the British Cast Plate Manufacturers v. Meredith*,² *Sutton v. Clarke*,³ and several other cases, as is well explained by Mr. Justice Williams in *Whitehouse v. Fellowes*.⁴

“ But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage shall be done.” In *Brine v. The Great Western Rail. Co.*,⁵ Mr. Justice Crompton says, “The distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner’s remedy by way of action remains.”⁶ The learned judge pointed out that this distinction is as applicable to works executed for one purpose as another. “It is pointed out by

¹ 4 Barn. & Ad. 30.

² 4 T. R. 794.

³ 6 Taunt. 29.

⁴ 10 C. B. (N. S.) 765.

⁵ 2 Best & Sm. 402, 411.

⁶ *Leader v. Moxon*, 3 Wils. 461; 2 Sir W. Bl. 424; *Sutton v. Clarke*, 6 Taunt. 29; *Jones v. Bird*, 4 Barn. & Ald. 837; see 11 H. L. Cas. 714.

“ Lord Campbell in *The Southampton Itchin Bridge v. The Southampton Local Board of Health* (8 Ell. & Bl. 801—812), that in every case the liability of a body, created by statute, must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statute is that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care and use reasonable skill, that the works are such as the statute authorizes, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them; there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil that duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute.”¹ The House of Lords gave judgment in accordance with this opinion of the judges.

We shall now proceed to notice in detail some of the principal points of the law relating to I. *Canals*; II. *Water Supply*; and III. *Docks*.

I. *Canals*.

A canal may be defined to be an artificial highway by water constructed for the benefit of the public by adventurers authorized by the legislature to take tolls for its use, as a compensation for their risk and labour in the undertaking. Definition of canal.

It differs from a river navigation chiefly in the fact that the company or proprietors working it do so for their own profit, and usually have the soil of the canal vested in them by the terms of their Act, whilst the trustees of a

¹ See *Ward v. Lee*, 7 Ell. & Bl. 426; *Clothier v. Webster*, 12 C. B. (N. S.) 798; *Ruck v. Williams*, 3 Hurl. & N. 308; *Whitehouse v. Fellowes*, 10

C. B. (N. S.) 765; *Brownlow v. Metropolitan Board of Works*, 13 C. B. (N. S.) 768; 16 C. B. (N. S.) 546.

river made navigable by Act of Parliament appear usually to have a mere possession of the soil for the purposes of improving the navigation, and, like dock trustees, to be bound to apply the profits for the future benefit of the public.¹

“Canals,” said Bayley, J., in *Rex v. Nicholson*,² “are real property; they are land applied to a particular purpose, and the tolls are the profits arising from that use of the land, and are given to the proprietors as a compensation for the use of it in that manner.”

Canal companies.

Pollock, C. B., in the case of *Manly v. St. Helens Canal Co.*,³ thus defined the status of the undertakers: “The owners of this canal are to be looked on as a trading company, who, though the legislature permits them to do various acts described in these statutes, are to be considered as persons doing them for their own private advantage, and are, therefore, personally responsible if mischief ensues from their not doing all they ought, or doing in an improper manner what they are allowed to do.”

Rights of canal companies defined and limited by Act of Parliament.

The method, therefore, hitherto pursued in treating of natural streams manifestly cannot be applied to the consideration of artificial waterways like canals. The ownership of the soil, and the rights and duties incident to canal proprietors, are in each case defined and limited by a particular private Act to which reference must be made in all cases involving the consideration of any of these points. In order to ascertain the law on this subject it will be necessary to examine the construction that has been put upon this class of enactments, for the purpose of arriving at general rules with regard to it.⁴

In order to consider the principles which have been

¹ See *ante*, Chap. II. p. 80, and *post*, Chap. VII.

² 12 East, 330.

³ 2 H. & N. 840.

⁴ There are, however, a certain number of general public statutes

regulating the traffic on canals, the charges of companies, and the liabilities of the owners of barges plying on them. See for these, *post*, Chap. VII.

followed in the construction of the private Acts incorporating canal companies, it will be well to state briefly what is the general nature of these enactments.¹

They usually vest the ownership of the soil of the bed and banks of the canal in the undertakers, with certain reservations to landowners, and empower the corporate body thus formed to levy tolls for the purpose of carrying on the navigation which exists for the benefit of the general public, though they themselves are not precluded from being carriers on their own canals. The company are bound to abstain from any act which may cause inconvenience or injury either to public or private owners when carrying out their works,² and to submit in certain cases to the due exercise of the rights of others where such rights do not interfere with their own.³

Such is the general tenor of these enactments, which are to be regarded as the form of contract between the public and the company. "Every canal Act," as was said by Lord Tenterden, C. J., in *Stourbridge Canal v. Wheely*,⁴ is to be considered as "a bargain between a company of "adventurers and the public, the terms of which are "expressed in the statute; and the rule of construction in "all such cases is now fully established to be this—that "any ambiguity in the terms of the contract must operate "against the adventurers, and in favour of the public; "and the plaintiffs can claim nothing which is not clearly "given to them by the Act. This rule is laid down in "distinct terms by the Court in the case of *The Hull Dock Co. v. La Marche*,⁵ where some previous authorities are

¹ See *post*, Chap. VII.

² *Geddis v. Bann Reservoir*, 3 App. C. 430; *A.-G. v. Bradford Navigation*, 35 L. J., Ch. 619; *Reg. v. Delamere*, 13 W. R. 757; *Preston v. Norfolk Rail. Co.*, 2 H. & N. 735.

³ *Monmouth Canal Co. v. Hall*, 4 H. & N. 121; *London and Birmingham Railway v. Grand Junction Canal*, 1 Rail. Cas. 224; *Blakemore*

v. Glamorganshire Canal, 2 C., M. & R. 133; *Glamorganshire Canal v. Blakemore*, 1 C. & F. 262.

⁴ 2 B. & Ad. 793; see *Parnaby v. Lancaster Canal*, 11 A. & E. 223; see, too, the remarks of Lord Eldon and Lord Lyndhurst in *Blakemore v. Glamorganshire Canal*, 1 M. & K. 162, 169; 1 C. & F. 262.

⁵ 8 B. & C. 51.

“cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Co. v. Hustler*.”¹

We will now proceed to consider the various decisions on particular enactments incorporating canal companies in the following order:—

1. Such as relate to the ownership of the soil;
2. Such as turn on the rights and duties of canal companies to other proprietors;
3. Such as refer to their duties towards the public in respect of the navigation.

Ownership of the soil vested in proprietors, but only for the purposes of their Act.

The soil of canals is, as a rule, vested in the proprietors absolutely by the terms of their Act, though only for the purposes for which they are incorporated.² Thus 16 *Geo. III. c. 28*, an Act for making and maintaining the Stourbridge Canal, empowers the company “to purchase land for the “use of the navigation, and vests the lands acquired by “voluntary or compulsory sale in the proprietors for “the use of the navigation, and for no other use or “purpose whatsoever.”³

They may, however, under certain circumstances, have a mere possession of land without being the owners thereof; as where the proprietor of the soil gives permission to a company to make erections, such as a dam or mound, upon it,⁴ and such possession has been held to entitle them to maintain trespass.⁴

The powers of companies vary considerably in this respect; and in each case, as was said by Lord Tenterden in *Stourbridge Canal v. Wheely*,³ “the canal having been “made under the authority of an Act of Parliament, the “rights of the company are derived entirely from that “Act.” As has been stated, however, whatever the extent

¹ 1 B. & C. 424; cf. Lord Brougham in *Stockton and Darlington Railway v. Barrett*, 11 C. & F. 590; 8 Scott, N. R. 641.

² *Bostock v. North Staffordshire*

Rail. Co., 4 E. & B. 798; *National Manure Co. v. Donald*, 4 H. & N. 8.

³ 2 B. & Ad. 792.

⁴ *Dyson and another v. Collick*, 5 B. & A. 600; *S. C.*, 1 D. & R. 225.

of the ownership may be, it is permitted solely for the purposes of the Act.

Thus a canal company, incorporated by Act of Parliament and having powers to take water for supplying their canal, cannot by user acquire an easement to take water for any other purpose, and the easement to take water to fill a canal, ceases when the canal ceases to exist.¹

So too, where an Act incorporating a canal company, empowered them to acquire lands compulsorily, which were to vest by the Act in the company in fee simple, "for the use of the said navigation, and to or for no other purpose or use whatsoever," but reserved to proprietors of purchased lands the minerals and fishery over their lands, and the right to use pleasure-boats over the whole canal and reservoir; it was held that the North Staffordshire Railway Company, in whom such rights and property were vested by a subsequent Act, could not lawfully use the lake or reservoir for any other purpose than supplying the navigation with water, and an injunction was subsequently granted to restrain them from holding a regatta thereon, and also from letting out boats for hire.²

In *Regina v. Archbishop of York*,³ B. was empowered to make a canal, to supply it from brooks, &c., and to inclose and appropriate lands proper for wharfs, quays, &c. Nothing was to authorize his using the lands for anything else than navigation. The works and things made in forming certain parts of the canal were to be B.'s property. A stream had been dammed up to feed the canal, forming a pool. This pool had been lowered and reduced in size. On part of the ground so recovered, B.'s successors had built limekilns, &c.—Held, that no right to the soil of the lands adjoining the canal, and applied to the purposes of the canal other than those works and things used in

Reg. v. Archbishop of York.

¹ *National Manure Co. v. Donald*, 4 H. & N. 8; see *Staffordshire and Worcester Canal v. Birmingham, L. R.*, 11 H. L. 54.

² *Bostock v. North Staffordshire Rail. Co.*, 4 E. & B. 798. See also *Hill v. Tupper*, 9 Jur., N. S. 725; and *ante*, Chap. IV.

³ 14 Q. B. 81.

forming the canal, passed to B. where there had been no actual purchase.—Held, also, that the Crown had no power to convey the lands in question. “If the statute gave them no more than such use of the soil as was necessary for the purposes of the canal, and they have not acquired the freehold in any other way, the right will be in her Majesty, and the verdict for her tenant is right, and we are of this opinion. . . . So long as the ground was covered with water penned back for purposes of the canal, it was difficult to say that the canal proprietors were doing anything but what their act justified, so long as they exercised powers and used the lands in a way which the Crown could not interfere with, and which was consistent with the Crown’s retaining the freehold of the soil.”—Lord Denman, C. J.

*Rochdale Canal
v. Radcliffe.*

In *The Rochdale Canal v. Radcliffe*,¹ an Act for establishing a canal company, provided that it should be lawful for owners of lands within twenty yards of the canal to draw off water for the sole purpose of condensing steam; such water to be returned to the canal, so that no damage should be done to the navigation. Defendant being tenant of a certain mill, drew off more water than was used for condensing. He set up a claim, as of right, to do so by twenty years’ user. It was proved that defendant had an old mill which had existed for twenty years, and that he had added a new mill within twenty years, communicating with the old one. The water was used for both. The existence of a cistern claimed in plea was not proved:—Held, first, the justification in respect of a certain mill was supported by proof of defendant having used the water of the old mill for twenty years. Held, also, the failure of proof as to the cistern did not entitle plaintiffs to an entire verdict.

The plaintiffs moved for judgment *non obstante veredicto*:—Held, that the company could not, consistently

¹ 18 Q. B. 287.

with their Act of Parliament, have granted water for uses not sanctioned by these Acts; that an actual grant, if proved for the purposes stated in the plea, would have been illegal, and that, therefore, a grant implied from twenty years' user, was no legal defence.¹

"This is a claim," said Erle, J., "to acquire a servitude on the canal by virtue of twenty years' user. The party seeking to establish such a claim must show a grant by a person capable of making the grant relied on. Now the grant here is by a person having no distinct ownership of the water, but entitled only to the flow of it for purposes of the navigation, and having no right to the surplus (which was given by the Act to the Duke of Bridgwater). If it appeared by direct evidence that the company had made a grant to the purport now supposed, setting out this title, that grant would have appeared to be against the right of the public, and void on the face of it. The twenty years' user, therefore, could establish no right."

A verdict having been obtained for nominal damages only, in the above case, it was held that the plaintiffs would have been entitled to an injunction, having sufficiently established their right at law, had it not been for their negligence.²

Reservations of fishery, mines, and such like rights, to the proprietors of lands on canals, are not uncommon in most of the Acts, which, it may be noted, ordinarily contain clauses empowering proprietors to sell, as well as those authorizing companies to buy, lands.³

Reservations of rights to proprietors of lands adjoining.

Thus, where a canal Act empowered the lord of any manor, and the owner of any lands through which the canal should be made, to erect and use any wharfs, quays, &c. in or upon their respective lands, and to land goods,

¹ 18 Q. B. 287; cf. *Rochdale Canal Co. v. King*, 14 Q. B. 122, 136; see *post*, p. 290 *et seq.*

N. S. 78.

³ See *post*, Chap. VII.; *Robins v. Warwick Canal*, 2 Bing. N. C. 483.

² *Rochdale Canal v. King*, 2 Sim.,

&c., provided they did not prejudice or obstruct the navigation or towing paths, it was held that an adjoining owner had a right to erect a wharf on his own soil, and to land goods on the towing path, and convey them across to his wharf.¹

Fishery.

Where the right of fishery in a canal is not reserved, as it sometimes is,² it is of the kind termed territorial, being identical with the ownership of the soil, though the proprietors are of course at liberty to let it.³

An Act of Parliament incorporating a canal company, provided that the lord of the manor through which the canal, reservoirs, &c. should be made, should have the right of fishery in so much of the canal, reservoirs, &c. "as shall be in the waste lands of his manor," and that the owner of any other lands through which the canal and a collateral cut should be made, should have the right of fishing "in the said canal or collateral cut:"—Held, that "commons or waste lands" meant commonable lands, the ownership of the soil of which was in the lord, and not open fields over which certain persons had rights in severalty. Held, also, that the right of an owner of land through which the canal passed, was limited to fishing in the canal and collateral cut, excluding the reservoir.⁴

Reservations
as to mines.

Reservations with regard to the right to work mines are usually made for the benefit of proprietors of purchased lands, the principle followed usually being to permit the working by the owner, at the same time making provisions in favour of the company, which empower them to inspect and purchase the mines where the operations carried on appear likely to endanger the canal.⁵

¹ *Monmouth Canal v. Hill*, 4 H. & N. 421.

² *Bostock v. North Staffordshire Rail. Co.*, 4 E. & B. 798; *Snape and Wife v. Dobbs*, 1 Bing. 202; *S. C.*, 8 Moore, 23.

³ *Woolrych*, Law of Waters, p. 65.

⁴ *Grand Union Canal v. Ashby*, 6

H. & N. 394.

⁵ *Cromford Canal v. Cutts*, 5 Rail. Cas. 442; *Barnsley Canal v. Twibill*, 3 Rail. Cas. 451; *Dudley Canal v. Grazbrook*, 1 B. & Ad. 59; *Birmingham Canal v. Dudley*, 7 H. & N. 969; *Wightly Canal v. Badley*, 7 East, 366; *Birmingham Canal v. Hawkesford*, 7 East, 371, note; *Stour-*

In the case of *Dudley Canal v. Grazebrook*,¹ an Act provided that no owner of any mines should work within twelve yards of the canal without leave of the company. If the owner wished to work the mines, he was to give the canal proprietors notice, and they might inspect. If they did not inspect he might work them, and if they refused to let him work them they were to buy. By another clause nothing was to defeat the right of owners of mines to work them, provided that in working the same no injury was done to the navigation. It was held that this proviso was to be construed with some qualification—namely, either that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary damage by working out of the usual mode. Therefore, where notice had been given of the working of a coal-mine under a reservoir, and the canal company had not purchased the owner's rights, it was held that he was entitled to work the mine under the reservoir in the ordinary mode, and the reservoir having been damaged by such working, no action was maintainable for such damage.

No action of tort will, however, lie against a canal company for damage done to a mine near their canal by flooding it, when they have done all in their power to prevent such flooding.

In the case of *Dunn v. Birmingham Canal Co.*,² the defendants were authorized under their Act to take land, doing as little harm as possible, and making satisfaction for all damage to any hereditaments prejudiced. The minerals under the canal were reserved to the owners, who were at liberty to work them provided no damage was done to the navigation. The owners were not to work the minerals without giving three months' notice to the defendants, who might inspect the mines and prevent the

bridge Canal v. Dudley, 3 L. J.,
Q. B. 108. See *ante*, Chap. III. p.
146.

¹ 1 B. & Ad. 59.

² L. R., 8 Q. B. 42.

working of them, paying the owners the value. The canal having been used many years, the plaintiff gave defendants notice that he was going to work certain mines, but the defendants did not inspect, and refused to buy. Plaintiff worked his mines without negligence, but without regard to supporting the surface, and defendants did all they could to keep the canal watertight. The result of the working was that the water of the canal escaped through the cracks and flooded the plaintiff's mine, whereupon he brought his action. It was held that no action of tort would lie, though Kelly, C. B., and Pigott, B., were of opinion that the plaintiff was entitled to compensation under the Act. "Striking out the charge of negligence," said Kelly, C. B., "the defendants are charged with nothing but that they brought water into the canal near the plaintiff's mine. They had full power under the Act to bring the water where they brought it."

In some cases Acts contain provisions for the benefit of mine owners with regard to the transport of the minerals along the canal passing through their lands.¹

Ordinary rules of construction as to conveyances binding on canal companies.

The terms of conveyances of land to the company are regulated in each case by the provisions of each particular Act, but the ordinary rules with respect to such contracts would appear to be binding on them.

A local Act empowered proprietors to contract for the sale of, and to sell their lands to, a canal company; and such contracts, sales, &c. were to be valid to all intents and purposes, and were to be enrolled with the clerks of the peace. Copies thereof were to be evidence; and on payment of the sums agreed on, the lands were to vest in the company. It was held that conveyances of land under the Act must be in writing.²

A canal company, empowered to purchase lands for

¹ *Finch v. Birmingham Canal*, 5 B. & C. 820.

² *Robins v. Warwick Canal*, 2 Bing. N. C. 483; see *Harborough v. Shadlow*, 7 M. & W. 37.

gross sums, or rent-charges, took possession of lands of an infant on agreement with his steward, and, after an award by commissioners of the gross sum or rent-charge, such sum was paid to the steward. No person being party to this award who had power to bind the infant, it was invalid, and no conveyance was executed, and the purchase-money was returned. The company, however, used the land for the canal, paying rent for forty years to the landowner after he attained his majority. It was held that no agreement for sale of the fee, in consideration of the rent-charge, could be presumed to have been entered into or ratified by the landlord, but that an action of ejectment, as well as the intended erection of a bridge by the latter, should be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers for the purchase of land.¹

In another case, lands were demised in 1779 by P. to M. and Company for sixty-five years. In 1794 an Act was obtained for making Swansea Canal through part of the lands in question; and it was enacted that on payment or tender of certain sums for the purchase of such lands, and, by leave of the owners, such lands should vest in the canal company. In 1797 the Duke of Beaufort made arrangement with the company to extend the canal through certain other of the lands. No payment or satisfaction was made, but the owners, &c. consented. On the termination of the lease of 1779, the assignees of the reversion brought ejectment against the assignee of the Duke of Beaufort, who remained in possession of the canals:—Held, the mere consent of the owner of the land to the construction of the canal did not bring the case within the Act, and the lessors of the plaintiff were entitled to the land. Per Parke, B., “The reversioner could not create such an interest except by deed.”²

A question as to copyhold lands arose in the case of

¹ *Somerset Canal v. Harcourt*, 2 De G. & J. 546. ² *Patrick v. Beaufort*, 6 Ex. 498.

*Dimes v. Grand Junction Canal.*¹ There an Act of Parliament gave the defendants powers to purchase lands, and also provided a form of conveyance. S. was tenant of copyhold land, and sold part to the company, the then lord not objecting. On the death of S., the lord made proclamation for the heir of S. to come and be admitted. No one appeared, and the lord seized the land "*quousque*," and brought ejectment against the defendants, and obtained judgment on the ground that the conveyance, under the canal Act, only vested in the defendants an equitable estate. He interfered to stop the navigation, and the defendants, having filed a bill praying that the customary heir of S. might be admitted on their paying all fees, and having sought a perpetual injunction, the Vice-Chancellor made a decree directing the customary heir of S. to be admitted to hold as trustee for the canal company, and granted an injunction. On appeal, the House of Lords affirmed this decision.

The Court will not grant a mandamus to compel a canal company to proceed to assess the value of land taken by them, if the parties interested in the land do not apply within a reasonable time, especially where there is another remedy by ejectment.²

Where a canal company had powers under their Act to take and give leases of other canals, and sold their rights under another Act to the Oxford Railway Company, it was held that the latter had authority to take a lease of another canal.³

Liabilities of
canal com-
panies as to
compensation
under their
Acts.

It is usual in canal Acts to insert clauses providing for the amount of compensation to be given by companies for damage done to the interests of neighbouring proprietors.

Thus a canal Act provided that no mine owner should work within forty yards of certain tunnels without leave of the company; and if the company, instead of insisting

¹ 3 H. L. 794.

² *Rex v. Stainforth*, 1 M. & S. 32; cf. *Shand v. Henderson*, 2 Dow,

519; see *post*, p. 287.

³ *Rogers v. Oxford Rail. Co.*, 25 Beav. 322.

on full forty yards, should require less than thirty yards, a quantity not exceeding thirty yards was to be left for the security of the mine. Whenever a mine should become workable within forty yards, the mine owner should give notice, and the company should pay him for so much of the forty yards as they required to be left:—Held, that where a mine had become workable within forty yards of the tunnels, and the company had required the whole forty yards to be left, the owner of the mine was entitled to compensation for the forty yards.¹

Where under a canal Act commissioners were appointed for settling all matters in dispute between the company and the owners of lands prejudiced, and the amount of compensation was to be assessed by a jury, and to be binding and conclusive to all intents and purposes; it was held that the verdict and judgment were conclusive as to the amount, but not as to the claimants' right to compensation.²

It was provided by an Act for making a canal, that in case of disputes a jury should assess the value of the land, and award recompense either for damages which should or might before that time have been sustained, or for the future, temporary, or perpetual continuance of any recurring damages. It was also enacted that all the works should be completed within fifteen years. A jury having assessed the value of land at 6*l.*, the present damage at *nil*, but the future damage at 2,800*l.*; it was held that this verdict was wrong, since, in order to enable the jury to assess future damages, the cause of the injury must already exist in some of the work done; and it was also held, that unless the undertakers had finally abandoned the work, they might take land on payment of 6*l.* at any time during the fifteen years.³

In the somewhat similar case of *Thicknesse v. Lancaster*

¹ *Fenton v. Trent and Mersey Navigation Co.*, 2 Rail. Cas. 837; cf. *Cromford Canal v. Cutts*, 5 Rail. Cas. 442; *Dunn v. Birmingham Canal Co.*, L. R., 8 Q. B. 42; *Reg.*

v. Delamere, 13 W. R. 757.

² *Barker v. Nottingham Canal Co.*, 15 C. B., N. S. 726.

³ *Lee v. Milner*, 2 M. & W. 824.

Canal Co.,¹ where no specified time was assigned within which the canal should be completed, it was held that a Court of law could not interfere, since no limitation as to time could be assigned to the powers conferred by an intendment that they were to be exercised within a reasonable time.

It has been held that the owner of tithes from land taken for the purposes of a navigation, being land covered with water, was not entitled to compensation as the owner of a hereditament under an Act giving compensation to all persons seised, possessed, or interested of or in any lands, tenements or hereditaments which should be taken thereunder.²

So, too, a person entitled to an easement over certain lands has been held not qualified to maintain trespass for acts done on such land, though he might have claimed compensation under a canal Act as soon as actual damage was sustained.³

In *Kennet and Avon Navigation v. Witherington*,⁴ the plaintiffs were authorized by an Act to maintain a navigation, and alter dams, &c. from time to time. Persons injured were to receive compensation from commissioners under the Act. The commissioners were named, and power was given them to appoint successors. They all died without doing so. The company afterwards raised a certain dam to the injury of the defendant, a mill-owner below:—Held that, although the mill-owner should have no longer any means of obtaining compensation—as to which point the Court gave no opinion—the power to alter the dam still existed.

At common
law for
negligence.

In addition, however, to the duty imposed on them by statute to make compensation, companies will be held liable at common law for damage done by them through negligence or mismanagement of their works.⁵

¹ 4 M. & W. 472.

² *Rex v. Commissioners of the Nene Outfall*, 9 B. & C. 875.

³ *Thicknesse v. Lancaster Canal*

Co., 4 M. & W. 472.

⁴ 18 Q. B. 530.

⁵ *Preston v. Norfolk Railway*, 2 H. & N. 735.

Where a canal Act contained provisions for compensation, it was held that such provisions related to the due and proper management of the works, and not to their negligent management, and, therefore, did not oust the right of action against a canal company for so negligently keeping their sluices open that their canal overflowed.¹

So too, where a canal company pumped foul water into a canal so as to make it a nuisance, it was held to be no defence that the foulness was caused by other persons;² and where a canal company so negligently managed a swivel bridge as to cause the death of a person passing over it, they were held liable to an action for nuisance as having a beneficial interest in the tolls, as any private person would be, and the representative of the deceased was held entitled to maintain an action against them under 9 & 10 *Vict. c. 93*.³

In the last-named case, it was contended for the company that they were no more liable than the trustees of a highway would be. Martin, B., however, said: "With respect to the first point, viz., that there is no distinction between this company and the trustees of a highway, it seems to me there is a most obvious one. It appears that in the 28th year of the reign of King George II. a certain number of persons were authorized to make this canal; and I find, by the recital of 11 *Geo. IV. c. 1*, that these works were made. The property in them was divided into 480 shares. Now, I have no doubt, that the shares in this canal constitute a most valuable property, and that there is no analogy whatever between the condition of this company and that of persons who exclusively and entirely act for a public trust. These are persons to whom the legislature gave the privilege of forming and completing a most valuable private property, and are as much responsible for any injury from

¹ *Cockburn v. Erewash Canal*, 11 35 L. J., Ch. 619.
W. R. 34.

² *A.-G. v. Bradford Navigation*, H. & N. 840.

³ *Manley v. St. Helens Canal*, 2

“works connected with it, as any other owner of private property would be.”¹

Where, however, companies keep strictly within the terms of their Acts, they will not be held liable, either for compensation or at common law, for injuries caused in the due execution of their works. All actions for injury caused thereby must be founded on negligence.

So where a canal company discharged water from their canal into a stream, and so injured certain works situated thereon, the jury having found that the canal company did all in their power under the circumstances, a verdict was directed for them, on the ground that there was no negligence.²

A canal formed under Act of Parliament had three levels, A. B. and C., and the proprietors, without authority, erected engines and pumped back water from the lowest level C. to the others. The plaintiff was possessed of a mill forge on the river Tame, into which the surplus water from C. level would flow. In 1826, the canal proprietors obtained, by means of a new Act, the right to maintain the engines, and to raise the water from one level to another, and to have reservoirs supplied from streams, making full satisfaction to all mill-owners, &c. for any damage. They were forbidden to take any water out of the river above the plaintiff's forge, and were to maintain flood weirs, so that all *waste water* not required should flow into the river above plaintiff's forge. The company pumped water from C., and in consequence whereof, except on extraordinary occasions, no water escaped over the weirs into the river:—Held, they were entitled to do so, and the plaintiff had no right to compensation; the water, which could be used again, was pumped back again, not being waste water.³

Where a swing bridge over a canal crossing a public

¹ See *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; 2 H. & N. 849; *Parnaby v. Lancaster Canal*, 11 A. & E. 227; and see *ante*, p. 267 *et seq.*

² *Whitehouse v. Birmingham Canal*, 27 L. J., Ex. 25; *Mayor of King's Lynn v. Pemberton*, 1 Sw. 244, 250.

³ *Ellwell v. Birmingham Canal*, 3 H. L. 812.

highway, when open for the passage of a barge left a gap, whereby a passer by, being on the bridge when it was dark, fell into the canal and was drowned, it was held that there being no negligence on the part of the company, and the deceased having been guilty of contributory negligence, no action would lie.¹ And in the same way, a canal company was not held liable for the death of a person drowned by falling into their canal where an ancient footway was twenty-four feet distant from their towing-path, and the intermediate space between the two had become obliterated by the act of unauthorized persons, since the owner of land near a public road is not under an obligation to fence excavations in his land, unless they are substantially adjoining the road, and so near as to be dangerous.²

If, moreover, the damage be caused by circumstances over which the company had no control, and can be proved to result from *vis major*, canal companies will not be held liable. *Vis major*,
how far an
excuse.

A canal company placed planks across their canal, when it was threatened with an overflow from a neighbouring river, in order to keep out the flood-water from their premises. The insertion of the planks raised the water, and the flood broke into the canal higher up than the planks, and, being penned back by the planks, flooded the plaintiff's premises. It was held that the canal company (the defendants) were not liable, since the water which did the mischief was not brought there by them.³ "The flood," said Bramwell, B., "is a common enemy against which every man has a right to defend himself, and it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed out of fear lest his neighbour might say—'You have caused me an injury.' The law allows what

¹ *Witherly v. Regent's Canal*, 12 App. Cas. 529.
C. B., N. S. 2.

² *Binks v. South York Railway*, ante, Chap. III.
3 Bing. 241. See *Lang v. Kerr*, 3

“ I may term a reasonable selfishness in such matters ; it
 “ says, ‘ Let every one look out for himself and protect his
 “ ‘ own interest.’ ”¹

Amphlett, B., said, “ The plaintiffs cannot succeed
 “ unless it can be shown that the canal, through what was
 “ done by the defendants, did bring a larger amount of
 “ water on to the plaintiff’s premises than would have
 “ gone there if the canal had never been made, or had
 “ been previously filled up.”¹

A similar principle was followed in *Boughton v. Midland and Great Western Rail. Co.*,² where the defendants, who were authorized by statute to make a canal, and required to keep it in good order, preparatory to making some repairs, turned the water into a drain (made for the purpose), whence it ought to have flowed (as it did on a previous occasion) into a public sewer, but, owing to an obstruction therein, flooded the plaintiff’s premises. The defendants heard of the flooding, but not of the cause, and took no steps to stop the discharge into the drain. It was held, that while acting under their statutory powers, they could not, in the absence of negligence, be made responsible for the injury, and, the jury having found that the damage was caused by the obstruction in the corporation sewer, that there was no evidence of such negligence on the part of the defendants.

Remedies for
 injuries by
 canal com-
 panies.

Where a particular jurisdiction is appointed under a canal Act to determine all questions as to things to be done under the Act, if the canal proprietors do anything not exactly in accordance with the terms of the Act, and not strictly within the powers thereby given, the person aggrieved is not restricted to the particular jurisdiction, but the complaint is to be entertained by the ordinary jurisdiction, on the principle that anything done not in exact conformity with the Act is not done in pursuance of it.³

¹ *Nield v. London and North Western Rail. Co.*, L. R., 10 Ex. 4.

² Ir. R., 7 C. L. 109.

³ *Shand v. Henderson*, 2 Dow (H. L. C.) 519.

Parties injured, however, are bound to use due diligence in applying for redress.

So where a canal company had deviated from the line prescribed by the Act, and had not adhered to the previous steps required thereby, in occupying the appellants' grounds, Lord Eldon, though he held that the company were trespassers, and liable to damage, said, "Where a person stands by while an act not strictly legal is done, having the means to prevent it, the remedy by injunction is gone."¹

A question as to the right to the surplus water of a canal under special Acts of Parliament arose in the case of *Blakemore v. The Glamorganshire Canal*.² The Acts of Parliament³ authorizing the formation of the canal contained a reservation, in favour of the owners of certain iron works, of the surplus water flowing from the canal, down a certain cut or watercourse. The canal works were to be completed within two years. Some years after the passing of these Acts, the plaintiff purchased the iron works aforementioned, and brought a series of actions against the defendants for making certain alterations in, and widening and deepening the canal for the purpose of increasing the traffic, whereby the flow of water to his works was diminished.

Rights to surplus water.

Blakemore v. Glamorganshire Canal.

At the first trial of this case the jury found that there had been a wilful waste of water in the management of the canal, with damages for the plaintiff, upon which judgment was entered up in the Court of Exchequer.⁴ Judgment afterwards came by writ of error before the Court of Exchequer Chamber, and ultimately before the House of Lords, and on both occasions was affirmed.

At the second trial⁵ it was held, that the company, having after the two years erected an engine to force up

¹ *Shand v. Henderson*, 2 Dow (H. L. C.) 519.

² 1 M. & K. 154; 1 C. & F. 262; 2 C., M. & R. 133; 3 Y. & Jerv. 60.

³ 30 Geo. III. c. 82; 36 Geo. III. c. 69.

⁴ 3 Y. & Jerv. 60.

⁵ 2 C. M. & R. 133.

more water into the canal, whereby they were enabled to pass more barges down it, the plaintiffs were entitled to consequential damages on account of the surplus water having been diminished. It was also held that, since by *sect. 7 of 30 Geo. III. c. 82*, the lock to be made near the plaintiff's works was to be always kept in good repair, for the purpose of preventing leakage or waste of water, the company had no right to pass water below the lock, though necessary to the lower part of the canal, except that which necessarily passed by barges being lowered through the locks, and that the "notch" constructed by the company for conveying water below the lock, was not authorized by the Act.

On the hearing before the House of Lords,¹ Lord Lyndhurst, *inter alia*, held, that the making of the canal fixed the rights of the parties, and the canal owners had no right afterwards to enlarge the canal, and draw much larger quantities of water, so as to injuriously affect the plaintiff's works; and that the clauses in the second Act (36 *Geo. III. c. 69*) directing that the canal should be completed in two years, and that the money to be raised should not be applied to the expense of any other work not made within the time, not only limited the application of the money to the works completed within the time, but that no works should be carried on adversely to the interests of individuals after the two years.

The plaintiff, Mr. Blakemore, subsequently obtained a series of injunctions to restrain the works of the company, in all of which he succeeded, the Court holding the canal company to be bound by the terms of their Acts.

"It does not appear to me," says Lord Eldon,² "to be of importance to consider whether these iron works have or not any right to the water, founded upon usage prior to the making of this canal; because I follow and adopt the expression of the Lord Chief Justice of the King's Bench, and I am glad to fasten myself in some measure on this great authority, and say that I regard them all

¹ 1 C. & F. 262.

² 1 M. & K. 162.

“ in the light of contracts made by the Legislature on
 “ behalf of every person interested in anything to be done
 “ under them ; and I have no hesitation in asserting, that,
 “ unless that principle is applied in construing statutes of
 “ this description, they become instruments of greater
 “ oppression than anything in the whole system of ad-
 “ ministration under our Constitution.”

On a subsequent day, in finally disposing of the case, his Lordship remarked :¹ “ If my opinion upon the effects
 “ of the Acts of Parliament be right, then, although the
 “ owners of these works must take the surplus water,
 “ subject to the diminution which an increase of trade
 “ upon the present canal shall occasion, let it increase ever
 “ so much, or ever so little, I can never agree to the
 “ proposition as laid down in some parts of the answer,
 “ that the proprietors of the navigation are at liberty to
 “ improve the canal for the purpose of bringing upon it
 “ an increase of trade, and by such improvements, with a
 “ view to a contemplated increase of traffic, to affect the
 “ surplus water, which was, I apprehend, to be preserved
 “ for the benefit of the plaintiff’s works.”

The plaintiff having filed a second and third supplemental bill against the same canal company in 1825 on the trial of certain issues framed upon the same principle with the issues formerly directed by Lord Eldon, Lord Lyndhurst in giving judgment stated that he concurred with Lord Eldon and Lord Wynford in considering the Acts of Parliament in the light of a bargain between the company of proprietors and the plaintiff, and in holding that after the canal was finally completed, the company were no longer at liberty to alter or enlarge it to the damage of Mr. Blakemore.

Lord Brougham, L. C.,² who granted the injunction, with certain limitations, commented on the construction put upon the Acts of Parliament, and hinted that he considered they had been somewhat too stringently con-

¹ 1 M. & K. 168.

² Ib. 161.

strued, though he was of opinion that the decisions already given ought not to be disturbed. "The leading principle, then, on which I proceed in dealing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay farther injury, to keep things as they are for the present."

*Staffordshire
and Worcester-
shire Canal v.
Birmingham
Canal.*

The case of *The Staffordshire and Worcestershire Canal v. Birmingham Canal*,¹ raised a somewhat similar point, and turned on the right to the use of the surplus water of one canal by the other.

The S. and W. Canal was formed under an Act of Parliament. Two years later another Act passed, authorizing the formation of the B. Canal, and requiring the latter company to make a "communication" between the B. and the S. and W. Canals at A., giving the latter company power to make this communication if the B. company should not make it within a given time. The communication was made by the S. and W. Company under an agreement between the two companies, and some years afterwards improved by B. Company, who saved much water by substituting two locks for one at one particular spot, the original communication being effected by means of twenty locks.

A consolidating Act was passed² which contained in the 15th sect. provisions enabling the B. Company, the proprietors of several canals, to raise the water of the canals from one level to another by reservoirs and machinery, &c. The 83rd sect., with a view to preserve the communication at A., forbade the B. Company to use water from or out of the W. level (which was the highest level of the B. Company—the communication at A. being 132 feet below it) for any purpose whatever when the depth of the water

¹ L. R., 1 H. L. 254.

² 5 Will. IV. c. xxxiv.

in the lowest lock of the B. communication should stand at less than three feet perpendicular, to be reckoned from the sill of an upper gate in the S. and W. Canal adjoining thereto, and in case of breach of this prohibition, and consequent injury to the S. and W. Company, directed that any damages sustained should be assessed by a jury. The 258th sect. prohibited the B. Company from doing anything to obstruct the navigation of the S. and W. Canal, or "in any wise to shorten or vary all or any of the "company's canals, so as thereby to impede the navigation of the S. and W. Canal" without the consent of the S. and W. Company. By the interpretation clause the word "canals" was to include "communications." The B. Company recently proposed to construct machinery which should pump back some of the water coming from the W. level, and so would affect the supply to the S. and W. Canal, but would not prevent the existence and free use of the communication at A. The S. and W. Company filed a bill to prevent the construction of this machinery, alleging that it was contrary to the intention of the Legislature, as shown in the various Acts, and to the deed of arrangement, and also contrary to the right which must now be taken as vested in the S. and W. Company by user and prescription.

The appellants relied on *Tapling v. Jones*,¹ and *Elwell v. Birmingham Canal*;² for the respondents, *Rochdale Canal v. Radcliffe*,³ *Magor v. Chadwick*,⁴ and *Arkwright v. Gell*,⁵ were, *inter alia*, cited.

It was held, affirming the decision of the lords justices, that the bill must be dismissed, and that the powers granted by the Acts were granted for specific purposes, which were those of making and maintaining a free communication between different places by navigable canals; and that the ordinary doctrines as to the permissive use of

¹ 11 H. L. Cas. 290.

⁴ 11 Ad. & E. 571.

² 3 H. L. Cas. 812.

⁵ 5 M. & W. 203.

³ 18 Q. B. 287.

water did not apply in such a case, and that no grant could be made by the B. Company of the use of any water which might injuriously affect these purposes. That consequently no right by prescription could in this case have any foundation in grant. Nor could any prescriptive right by user be founded on the fact that the B. Company had for many years allowed the water to pass out of the B. canal in a particular manner, so as to prevent the B. Company from afterwards improving its machinery and economising the water, for the water so passing into the S. and W. Canal, did not constitute a stream or water-course within the meaning of the Prescription Act, 2 & 3 *Will. IV. c. 71*. The object of the communication being fully secured, the proposed works, it was held, were not an impeding or obstructing of the S. and W. Canal, such as was prohibited by the Act.

“The 2nd section of that Act” (2 & 3 *Will. IV. c. 71*), said Lord Chelmsford, L. C., “applies to a claim to the “use of water which may be lawfully made at common “law by custom, prescription or grant. Custom and prescription are here out of the question, and if the respondent could not have granted the use of the water to the “appellants, the Act is wholly inapplicable; but to impose “such a servitude upon the water in their canal, as that “contended for by the appellants, would have been *ultra vires* of the respondents, and consequently length of user “could never confer an indefeasible claim upon the appellants under the Prescription Act, as no grant of the use “of the water could have been lawfully made by the “respondents.”

Lord Cranworth observed, “The water flowing from the “Wolverhampton level to the Atherley junction is not “a natural nor even an artificial stream. The water in “the canal is not flowing water. It is accumulated under “the authority of the legislature in what is in fact a tank “or reservoir, which the respondents are bound to economize and use in particular manner for the convenience of

“ the public. It never flows. It is let down artificially
 “ for the convenience of persons wishing to pass in boats.
 “ To such water none of the doctrines, either as to natural
 “ or artificial streams, is applicable; and the only way in
 “ which appellants could have obtained a right to insist,
 “ on having a lock full of water discharged into their
 “ canal, must be by express grant or covenant by respon-
 “ dents. Of such grant there is no trace whatever, and it
 “ cannot be presumed. To have entered into any such
 “ engagement would have been a clear breach of duty in
 “ respondents.”

In the case of *Mason v. Shrewsbury Rail. Co.*,¹ a canal company, under the powers of their Act, diverted before 1800 a great part of the waters of a brook flowing through the plaintiff's land to their canal, the rest of the water continuing to flow as before. In 1847 the defendants, under Act of Parliament, bought and discontinued the canal, and in 1864 restored by means of a cut the water which had been diverted. In 1865 they sold the part of the canal on which was the cut. The bed of the brook, owing to the diminished scour from 1800 to 1853, had become silted up, so as not to be sufficient to carry off the water in extraordinary floods. In 1866, such a flood having damaged the plaintiff's land, it was held by the court, that there being no obligation imposed on the canal to continue the diversion of the water, plaintiff had no right of action. The opinion of Blackburn and Hannen, JJ., proceeded on the ground that, though the claim to have the water diverted was a claim to a watercourse under the Prescription Act, 2 & 3 Will. IV. c. 71, yet the enjoyment was not of right, and, therefore, though of more than forty years, it conferred no right on the plaintiff. That of Cockburn, C. J., was based on the ground that the plaintiff, the owner of the servient tenement, could acquire by the mere existence of the easement, no right against the owner of the dominant

Claim against
 a canal com-
 pany to have
 water
 diverted.

¹ L. R., 6 Q. B. 578; cf. *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Hodgson v. Mayor of York*, 28 L. T., N. S. 836.

Canal companies entitled to ordinary remedies at law.

tenement. "The question appears to me to depend on "principles of the law relating to easements, which would "have been equally applicable if the Act in question "(Prescription Act) had never been passed."¹

Where the statutory rights of companies are infringed, they are entitled to the ordinary remedies at law.²

"Such a company," said Erle, J., in *Rochdale Canal Co. v. King*,³ "has all the rights and remedies which an "individual owner of property has, unless the statute "contains some provision to take them away."

In that case the plaintiffs were empowered to purchase lands for making a canal, and manufacturers within a certain distance were authorized to lay pipes and to use water for the sole purpose of condensing steam; disputes with any person desirous of taking or using the same were to be referred to commissioners.

The declaration stated that the company had made the canal and that the defendants had used the water for purposes other than that of condensing steam. It was objected in arrest of judgment that the declaration did not show any ownership of the canal or water, or any invasion of a private right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that the repetition of the act could never be used as evidence of a right; that the remedy was by indictment, and that the complaint should have been referred to the commissioners who had exclusive jurisdiction.

It was held, however, that the declaration was good, as it must be held that the company was in possession of the canal, and that without special damage the wrongful act was a damage to the company's right; and also that the jurisdiction of the commissioners was over disputes between persons in the use of or about to use the water for a right-ful purpose, and not over wrongdoers.⁴ Erle, J., observed,

¹ See *ante*, Chap. IV., p. 252 *et seq.*

² *Rochdale Canal v. King*, 14 Q. B. 122, 136.

³ *Ib.*; cf. *Rochdale Canal v. Rad-*

cliffe, 18 Q. B. 287; see *ante*, p. 278.

⁴ See *Cockburn v. Ercwash Canal*, 11 W. R. 34, *ante*, p. 283; *Shand v. Henderson*, 2 Dow (H. L. C.) 519, *ante*, p. 286.

“It is said the company could have no property in this water; perhaps not in the identical passing atoms, but they had in the flow, the *flumen aquæ*.”

In bringing actions, canal companies, like individuals, are liable to be deprived of their remedy by laches.

Where a canal company made a demand in May, 1842, for penalties for obstructing their canal, such obstruction having been caused in November, 1840, and June, 1841, and brought no action till July, 1842, it was held that they were too late, since by the Act of the Railway Companies, who had caused the obstruction, no action was to be brought against them for injury done in pursuance of the Act after six months, which six months were held to begin to run from the ceasing of the obstruction, and not from the demand for non-payment of the penalty.¹

The owners of a canal taking tolls for the navigation are bound, at common law, to use reasonable care in making the navigation secure.² Duties with regard to navigation.

*Parnaby v. Lancaster Canal*² was an action which came before the Exchequer Chamber on error from the Court of Queen's Bench. The declaration in the case stated that by 32 *Geo. III. c. 101*, the Lancaster Canal Company was formed to make and maintain the canal, with power to take tolls, and that all persons had free liberty to navigate the canal; but if any boat should be sunk in the canal, and the owner or person having care of it should not, without loss of time, weigh it up, the Act empowered the company to weigh it up and detain it till payment of expenses. That the company completed the canal, and took tolls on it; that a boat Duty to maintain navigation.

¹ *Kennet and Avon Canal v. Great Western Rail. Co.*, 4 Rail. Cas. 90; cf. *Rochdale Canal v. King*, 2 Sim., N. S. 78; *Lord Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138; *Fraser v. Swansea Canal*, 1 Ad. & El. 354; *S. C.*, 3 N. & M. 391; see Lord Brougham in *Blakemore v. Glamorganshire Canal*, 1 M. & K.

161; *Shand v. Henderson*, 2 Dow (H. L. C.) 519.

² *Parnaby v. Lancaster Canal*, 11 A. & E. 223; see *Mersey v. Gibb*, L. R., 1 H. L. 93; *Winch v. Conservators of Thames*, L. R., 9 C. P. 738; L. R., 7 C. P. 456; *Forbes v. Lee Conservancy*, 4 Ex. Div. 116; and *post*, Chap. VII.

sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that, although the company could and ought to have requested the owner to weigh it up, and, if that was not done without loss of time, could and ought to have weighed it up, and, in the meantime, have caused a light or signal to be placed to enable boats to avoid it; yet the company did not cause the owner, &c. to weigh it up, nor themselves weigh it up, nor place a light or signal, whereby the plaintiff's boat, navigating the canal, ran foul of the sunken boat and was damaged.

On the trial, before Coleridge, J., at the Liverpool Summer Assizes, 1836, it was objected that, admitting the facts as laid in the declaration, no breach of duty was shown. Verdict being given in favour of the plaintiffs, leave was reserved to move for a nonsuit.

Lord Denman, C.J., delivering the judgment of the Court, after hearing the arguments in favour of the defendants said, "We do not feel the smallest doubt that this action may be maintained. The only one of the numerous cases cited, that appeared to point the other way, is *Harris v. Baker*,¹ where trustees of a road were held not liable to an action for a personal injury arising from the plaintiff's falling in the night-time over a heap of scrapings placed on the roadside by the defendant, who placed no light to give notice of the obstruction. But that case may be distinguished, as the action was against public officers who derived no benefit from the road. The present defendants, on the contrary, invite the whole of the public to navigate on their canal in consideration of the tolls paid. They have lawful power to make the canal in all respects fit for navigation, and particularly to remove the kind of obstruction by which the plaintiff suffered. It is the same in principle as if they announced the carrying on of a business at premises accessible only by a certain road over their land, which was open to the public for

¹ 4 M. & S. 27.

“that purpose, but which they only, and not the public, had a right to repair, and they left that road in so bad a state that a person’s leg was broken when he came to transact business with them there. A more familiar example, and not of a rare occurrence, is that of a shop-keeper who leaves a trap-door open in his shop, and causes a customer to fall down and suffer injury.”

The plaintiffs having entered up judgment, the defendants brought error in the Exchequer Chamber, when the judgment of the Court of Queen’s Bench was affirmed.

Tindal, C. J., after stating the facts of the case, said:¹ “The principal objection in this case was, that the clause recited in the declaration, and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or permissive clause only. And we are all of that opinion. Neither the clause recited, nor anything in the Act of Parliament contained, imposes such a duty on the defendants below; and the allegation in the declaration as to the duty of the company seems to have been founded on a mistake as to the true meaning and effect of that clause. But admitting this to be so, the question then arises whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this company; and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not,

¹ 11 A. & E., p. 242.

“ perhaps, to repair the canal, or absolutely to free it from
“ obstructions, but to take reasonable care, so long as
“ they keep it open for the public use of all who may
“ choose to navigate it, that they may navigate without
“ danger to their lives or property. We concur with the
“ Court of Queen’s Bench in thinking that a duty of this
“ nature is imposed upon the company, and that they are
“ responsible for the breach of it, upon a similar prin-
“ ciple to that which makes a shopkeeper, who invites the
“ public to his shop, liable for neglect on leaving a trap-
“ door open without any protection, by which his cus-
“ tomers suffer injury. The declaration, it is true, con-
“ tains no averment of such a duty, which it need not do,
“ nor any allegation in express terms of the breach of such
“ duty. But the question still is, whether the facts alleged
“ do not necessarily imply that there was a breach of that
“ duty. We have felt some doubt upon this point; but
“ we think, on consideration, that in substance such breach
“ of duty is sufficiently assigned. It is averred that the
“ company had notice of the obstruction by the sunken
“ boat, and they did not (within such a reasonable time
“ *after such notice*) either weigh up the boat, or remove
“ the obstruction in any other way, or do that which, in
“ the event of their choosing to do neither of those things,
“ they certainly ought, if they had used reasonable care
“ to prevent accidents, to have done,—namely, either place
“ a signal, or give some notice to those who were navi-
“ gating in that part of the canal. The allegation that
“ they neither removed the obstruction, nor gave actual or
“ constructive notice of it, amounts to an allegation of a
“ breach of their common law duty to take reasonable care
“ to prevent mischief by the obstruction; and the allega-
“ tion that they did not do so within a reasonable time after
“ notice, is equivalent to a statement that a reasonable
“ time had elapsed to have enabled them to have either
“ removed the obstruction or given such notice of it. On
“ this ground we think that there is a good breach of a
“ common law duty, and that the declaration may be

“supported, and, consequently, that the defendant in error is entitled to our judgment.”¹

It follows from the principle above noticed, that canal proprietors will not be enabled to recover damages for injuries to their navigation unless they keep it in good order. A canal company, who were bound to repair the banks of their navigation, brought an action against an adjacent landowner for digging clay pits on his land, and so causing the plaintiffs' banks to give way. There was some evidence that the banks were not in good repair; but the learned judge directed the jury to find for the plaintiffs if they thought the falling in of banks was caused by the digging the clay pits:—Held, that the plaintiffs were not entitled to recover unless the banks were in good repair.²

Right to recover for damage to navigation.

In *Walker v. Loe*,³ commissioners of a navigation were authorized to lease the canal, and, in case the lessees should permit the canal to be out of repair, the commissioners were authorized and required to give them notice, and to specify the repairs which ought to be done. In case the lessees neglected to do the repairs, the commissioners might seize the tolls. The canal having been leased, the lessees allowed the canal to get out of repair; but the commissioners gave no notice to them, and a barge going through a lock was damaged by the lock falling in. It was held that the barge owner, assuming a duty on the part of the commissioners to give notice, had no right of action against them, as the damage to the barge was not a damage naturally flowing from their neglect; it being pointed out by Wightman, J., that the primary duty to repair was on the lessee.

In *Llewellyn v. Swansea Canal*,⁴ where the company had by their act the usual powers for maintaining the navigation, the question as to what constitutes acts necessary for

What are works necessary for maintaining navigation.

¹ See further as to “NAVIGATION” and the duties of persons navigating, *post*, Chap. VII.

² *Staffordshire Canal v. Hallam*, 6 B. & C. 317.

³ 1 H. & N. 350.

⁴ 2 H. & N. 509.

maintaining navigation, was raised. The defendants had agreed to pay the plaintiffs 10% a week for any water above a certain lock, when they should consider it necessary for maintaining the navigation of the canal below that lock. It was held—when, boats having twice sunk in going through the lock, the plaintiffs each time emptied it, in order to get them up, and then filled from above the lock—that this was not using the water for the purposes of *maintaining the navigation* below the lock, and, therefore, that the 10% a week could not be recovered. But when, on another occasion, they did the same for the purpose of repairing the lock below, it was held that the 10% was recoverable, since the latter object did constitute such a purpose.

Where a canal company were authorized to make a canal, and do other acts necessary for the making, improving, and using it, it was held that they were empowered to deepen and widen it after it had been completed, and to charge for so doing.¹

A company were authorized by a navigation Act to maintain a navigation, and to alter dams, &c. from time to time; and it was provided that persons injured were to receive compensation from commissioners under the Act. The commissioners were named; and power was given to them to appoint successors, but they all died without doing so. The company afterwards raised a certain dam, to the injury of a mill owner below, who pulled it down. It was held that the power to alter the dam still existed, although the mill owner should have no longer any means of obtaining compensation, on which point the Court gave no opinion.²

Bridges.

Canal companies are usually empowered by the incorporating Act to construct and maintain bridges—a provision which is rendered necessary to remedy inconveniences arising from their powers to interrupt highways.

¹ *Rex v. Glamorganshire*, 7 B. & C. 722.

² *Kennet and Aron Navigation v. Witherington*, 18 Q. B. 530.

Thus, in *Rex v. Lindsay*,¹ a canal company having such powers, who had made a cut and deepened a ford crossing a highway, and had thereby rendered a bridge necessary, were held bound to maintain it, and unable to throw the burthen of the repair on the inhabitants of Lindsay, county Lincoln.

Bridges thus constructed must be adequate to meet the wants of the public.

This point was thoroughly discussed in the case of *Manley v. St. Helens*,² already referred to.

There the defendants were authorized by an Act of Parliament to make a canal, and to take tolls and make bridges, and to turn and alter highways as necessary. By a subsequent Act, 11 *Geo. IV. c. 1*, to consolidate and amend the former, it was recited that the navigation cut or canal, and other the works authorized to be made by the recited Act, have been long since made and completed. By sect. 48, the company were empowered to maintain the canal, bridges, &c.; and by sect. 124, all persons were to have free liberty with boats to navigate the said canal for the purpose of conveying goods, &c. The company made a cut through a public highway near to St. Helens, then a small village, and made a swivel bridge over it. Penalties were imposed on persons leaving open bridges. A boatman having left the swivel bridge open, a person coming along fell in and was drowned. It was proved that when the bridge was open, there was no fence between the road and the water, and that two lamps, which used to be there, were removed.

The jury having found that the deceased was drowned by neglect of the company, it was held that they were liable to an action for nuisance, as having a beneficial interest in the tolls, as any private person would be; that the representative of the deceased was entitled to bring an action against them under 9 & 10 *Vict. c. 93*, and that the

¹ 14 East, 317. See as to ² 2 H. & N. 840.
 “BRIDGES,” *post*, Chap. VIII.

bridge being in their possession the action was rightly brought against them and not against the boatman. It was further decided that whether or not the bridge was sufficient when built, the company were bound to maintain it sufficient with reference to present circumstances.

Martin, B., remarked¹:—"It is perfectly clear what is the common law obligation of persons who make canals of this kind. They may make a bridge, but common sense points out it must be a proper bridge, and fit for travelling over; and I agree with the Lord Chief Baron that if we were now discussing what kind of bridge it ought to be, I should say a bridge suitable to the present state of society."

Watson, B., said:—"The case is neither more nor less than this—certain persons are empowered to make a canal through a district, not merely for the benefit of the public, but to expend money and derive benefit and profit from the use of the canal. A statute gives them power to interrupt a public highway—a thing that can only be done by the authority of Parliament,—and to make a bridge which shall be open so as to let boats pass. So far the company are justified in what they did; but they are not like the trustees of a public highway, who are allowed to stop a public way in order that their own work may be of use. The ground on which I decide the present case is, that if Parliament empowers persons to interfere with a public highway, they may do it, but not so as to prejudice the lives and limbs of people. For instance, a gas company or a water company may put pipes through streets, but must not do it in such a way as shall prejudice persons passing by; they may make trenches in the streets, but are bound at night to place lights, &c. so as to prevent the Queen's subjects being injured. That is the principle—the power must be exercised reasonably and not to the prejudice of the public; and that is also the effect

¹ 2 H. & N. 852.

“ of this verdict, as I read it, and I think any other verdict
“ would be erroneous.

“ Several objections have been suggested to the plain-
“ tiff's right to recover. First, that this company is like
“ ordinary public trustees, as for instance, turnpike trustees ;
“ but that is not so. Such persons are empowered to collect
“ tolls, not for the benefit of themselves, but of the public ;
“ they are public officers discharging public duties for the
“ benefit of the public. . . . Then it is said this is an injury to
“ an individual from a public nuisance, and therefore not
“ actionable. It is quite clear that any injury to a public
“ right is indictable, and that a person can only maintain
“ an action in such a case when he has sustained in-
“ dividual damage from it. But that is not this case—a
“ disturbance of a public right is authorized by statute,
“ but the injury is caused by the negligence of the
“ parties.”

As to what amounts to a dedication of a bridge erected by a company to the public can only be decided by the evidence in each particular case.

A company required by the terms of their Act to make bridges over their canal for the use of adjoining land-owners, erected a swivel bridge for the use of the Rolls Estate. From 1810 to 1822 the public occasionally used it. From 1822 to 1832 the company took tolls from persons not of the Rolls Estate crossing it, and in 1834 they built a stone bridge. In an action for trespass for crossing the bridge without leave, Lord Denman told the jury that, supposing the bridge to have been originally built as a carriage way for the exclusive use of the Rolls Estate, still, if in consequence of acts of the company an idea grew up in the public mind that they intended to dedicate the bridge to the public, such act would amount to a dedication. It was held that, taking all the summing up together, there was no misdirection ; that the evidence warranted the jury in finding a dedication, and that there

was nothing in the constitution of the company to prevent them from so dedicating it.¹

Navigation
open to public
on paying
tolls.

The navigation of canals² is, of course, open to all the public on the payment of tolls, and it has been held that there is a public right of user of a canal with boats propelled by steam, provided they do no more injury than is occasioned by traction by horses.³

It has been held that a provision in a local Act (9 *Geo. III. c. 71*), empowering a company to make bye-laws for the government of a navigation, bargemen, &c., and to impose tolls, did not authorize them to make a bye-law closing the navigation on every Sunday in the year, and declaring that no business should be done thereon, nor should any person navigate any boat, &c. on penalty of 5*l.*⁴

Tolls.

The subject of tolls will be found treated at length in a subsequent chapter,⁵ and therefore it will be only necessary here briefly to allude to it.

Where a canal is made by Act of Parliament, the right to take tolls being derived solely from the Act, is to be considered as a bargain between the owners and the public; and where there is any ambiguity, it must be construed against the canal proprietors, who can claim nothing which is not given them by the Act.⁶

Such was the principle laid down in the case of *Stourbridge Canal v. Wheeley*.⁷ There a canal was formed upon two levels, which were connected by a chain of locks (there being no lock whatever on the upper level), and where the Act of Parliament making the canal authorized all persons to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the company,

¹ *Grand Surrey Canal v. Hall*, 1 M. & G. 392.

² See further as to "NAVIGATION," *post*, Chap. VII.

³ *Case v. M. Rail. Co.*, 5 Jur., N. S. 1007. The case was ordered to stand over for experiments to be made by an engineer appointed by the Court to ascertain the damage to the canal by

the use of steam.

⁴ *Calder and Hebble Navigation v. Pilling*, 3 Rail. Cas. 735.

⁵ See *post*, Chap. IX.

⁶ *Leeds and Liverpool Canal v. Hustler*, 1 B. & C. 424; *Stourbridge Canal v. Wheeley*, 2 B. & A. 793.

⁷ 2 B. & A. 793.

not exceeding the rates therein mentioned; and also by another clause, authorized the company to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks, but gave the owners of adjoining lands power to use pleasure-boats on the canal without paying dues, so as the same did not pass through any lock, and were not used for carrying goods: it was held, that the Act gave the company no right to demand tolls for boats navigating the upper level of the canal, in which there were no locks.¹

In *Britain v. Cromford Canal*,² where, by a canal Act, a toll of 1s. per ton was imposed upon all coal, &c. navigated upon any part of the canal from a place A., or from any place within two miles thereof: it was held, that this only applied to voyages commencing within those limits, and that no such toll was payable for coal loaded at a place more than two miles from A., although conveyed upon a part of the canal within *two* miles of A.

That was an action of trespass for seizing and detaining plaintiff's barge. Plea the general issue. The justification of the defendants depended upon a claim of an additional toll of 1s. per ton gross tonnage on coal or coke navigated upon a certain part of the Cromford Canal. The clause under which the claim was made ran: "For all
" coal or coke which shall be navigated, carried and con-
" veyed upon any part of the said intended canal, from
" the place where the said canal shall cross the river
" Amber, or for any place within two miles thereof and
" passing in the direction of Cromford, the further sum of
" *one shilling* per ton."

At the trial at the Derby Assizes before Abbott, C. J., it appeared that the plaintiff's barge, having commenced her voyage at a place more than two miles from the point mentioned in the above clause, had been navigated on a part of the Cromford Canal with coal and coke on board,

¹ *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792.

² 3 B. & A. 139.

within the specified distance, and that she was passing in the direction towards Cromford. The learned judge, at the trial, thought that this did not make the plaintiff liable to pay this additional toll, and a verdict was found in his favour.

A new trial being moved for, on the ground that the learned judge was mistaken in his construction of the clause, the rule was refused, Abbott, C. J., saying: "I thought at the trial that the words 'navigated from,' used in this clause, denoted a voyage from the place where the goods were loaded on board the barge. I think so still." Bayley, J., remarked: "The ground for this toll was that great expense was incurred by the company in making this part of the canal. And as persons who travelled only a short distance on the canal would pay only a small toll, the legislature provided, that if that short distance was in this particular spot, they should pay an additional toll. That reason, however, does not apply to persons who come from a distance, and whose ordinary payments, therefore, are more considerable. I think, therefore, the legislature, in using this mode of expression, must have contemplated a voyage commencing within the specified limits. Our construction may, perhaps, be inconvenient in cases where that voyage commences just beyond the limits, but we cannot make a new toll."

As noted above, the varying of tolls and the regulation of traffic, are now provided for by various general statutes.¹

The decision in the case of *Strick v. Swansea Canal*,² turned on the construction of 8 & 9 Vict. c. 28, and of *The Railway Traffic Act*, 1854 (17 & 18 Vict. c. 31).

A canal company were authorized by their Act to demand a fixed sum for goods carried over any part of the canal, which said respective rates should be equal

¹ 8 & 9 Vict. c. 28; 8 & 9 Vict. c. 42; 10 & 11 Vict. c. 94; 17 & 18 Vict. c. 31; 36 & 37 Vict. c. 48;

37 & 38 Vict. c. 40, &c.; see *ante*, p. 270, and *post*, Chap. VII.

² 16 C. B., N. S. 245.

throughout the whole length of the said intended canal. By a subsequent public Act, 8 & 9 *Vict. c. 28*, proprietors of canals were empowered to vary or alter the tolls granted to them, "either upon the whole or for any particular portion or portions of such canals, according to local circumstances, or the quantity of traffic, or otherwise, as they should think fit;" with a proviso that such tolls were to be charged equally to all persons and after the same rate, whether per ton or per mile, in respect of all boats of the like description passing along or using the same portion of canal, and all goods, &c. of the like description conveyed or propelled in a like boat, &c., passing along or using the same portion of the said canal under the like circumstances:—Held, that it was competent to the company to agree to carry at a lower rate for a particular individual in consideration of a larger guaranteed minimum toll, in order to enable them to enter into a successful competition with rival lines of railway.

Erle, C. J., said: "It seems to me that the contract with the Ystalyfera Iron Company falls exactly within the principle which has been laid down as to railway companies by many cases in this Court,—where it has been held that the company is guilty of no violation of *The Railway Traffic Act*, 1854, in carrying large guaranteed quantities of any description of goods for long distances in full train loads at lower rates than they will carry smaller quantities for less distances and without such rates. I see nothing unreasonable in such an arrangement. . . . I am of opinion that the tariff is valid."

Byles, J., remarked: "It seems to me that *The Railways Clauses Consolidation Act*, 1845, which is recited in 8 & 9 *Vict. c. 28*, and *The Railway Traffic Act*, 1854, are in *pari materiâ* with this Act, and that it ought to receive substantially the same construction. The proviso in sect. 2 is not absolute. . . . The principle adverted to by my lord has been laid down and acted upon in a

“great number of cases in this Court, the most recent of which is *In re Oxlade and The North Eastern Rail. Co.*¹ The same principle was acted upon in the cases of *In re Jones and The Eastern Counties Rail. Co.*,² *In re Nicholson and The South Western Rail. Co.*”³

It has been held that the mortgagee of the tolls of a canal, held by him in trust to pay creditors and discharge incumbrances, is a proprietor of a river navigation, so as to be liable to the payment of the salary to the clerk.⁴

We will conclude this section with a few remarks as to canal shares,⁵ though a full consideration of this branch of law does not properly come within the scope of this work.

Canal shares.

Canal shares are not estate and interest in land within the meaning of the Statute of Mortmain; and it does not matter if the Act of Parliament incorporating the company does not contain a clause declaring the shares to be personal property.⁶

Where an Act of Parliament declared that canal shares “should be deemed personal estate, and transmissible as such,” they were held to be personal property, though the profits arose out of land, and to pass as such upon the bankruptcy of the holder.⁷

Where by Act of Parliament canal shares were to be deemed to be personal estate, it was held that they did not bear the character of realty so as to make a bequest of them specific.⁸

¹ 15 C. B., N. S. 680.

² 3 C. B., N. S. 718.

³ 5 C. B., N. S. 366. Cf. as to this class of cases, *Staffordshire and Worcestershire Canal v. Trent and Mersey Navigation*, 6 Taunt. 151; see Woolrych, p. 308; *Rex v. Leicestershire and Northamptonshire Canal*, 3 Rail. Cas. 1; see Woolrych, p. 309; also *Keppel v. Bailey*, 2 Myl. & K. 517.

⁴ *Tibbitts v. Yorke*, 5 B. & Ad. 605.

⁵ As to calls for canal shares,

see *Huddersfield Canal v. Buckley*, 7 T. R. 36; *Wald of Kent Canal v. Robinson*, 5 Taunt. 801; *Norwich and Lowestoft Navigation v. Theobald*, Moo. & Malk. 151; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341; see Woolrych, p. 50 *et seq.*

⁶ *Edwards v. Hall*, 6 De G., M. & S. 74.

⁷ *Ex parte Lancashire Canal Co.*, 1 Dea. & Ch. 411.

⁸ *Robinson v. Addison*, 2 Beav. 515.

By a canal Act the shares were to be deemed personal property. The canal ran through the dioceses of Worcester and Lichfield. The transfer of shares and payment of dividends was in Lichfield:—Held, that for purposes of probate, the shares, being personal property, might be considered locally situate in Lichfield.¹

The Court will grant a mandamus to a canal company to enter on their books the probate of the will of a shareholder, leaving any question as to validity of probate to be raised by return to the writ.²

The law relative to canal tolls, and the rateability of canals and canal tolls, is fully discussed in a future chapter.³

II. *Water Supply.*

Water is supplied⁴ to the public (1) By companies having parliamentary powers; (2) By companies which have no such parliamentary authority; or (3) By local authorities,⁵—each of which requires a separate notice.

(1) *In the case of companies having parliamentary powers*, a special Act is obtained, with which it is customary to incorporate the following general enactments:—*The Waterworks Clauses Acts*, 1847 and 1863; *The Lands Clauses Consolidation Acts*, 1845, 1860 and 1869; and *The Companies Clauses Consolidation Acts*, 1845, 1863 and 1869.⁵

The preamble of *The Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17),⁶ states that it is expedient to comprise in one Act sundry provisions usually contained in

Water supply under three kinds of bodies.

Companies with parliamentary powers.

The Waterworks Clauses Acts.
10 & 11 Vict. c. 17.

¹ *Ex parte Horne*, 7 B. & C. 632.

² *Rex v. Worcester Canal*, 1 M. & R. 529.

³ See Chap. IX.

⁴ The law relating to water supply is manifestly too wide a subject to be treated exhaustively in a work like the present. The reader is referred for details to the excellent work of Messrs. Michael & Will on the Law relating to Gas and Water Supply (2nd edition, 1877), to which the authors are in-

debted for most of the materials for this section.

⁵ Michael & Will, p. lvi.

⁶ An Act for consolidating in one Act certain provisions usually contained in Acts authorizing the making of waterworks for supplying towns with water. Sect. 12 does not empower a company to execute any works not authorized by the special Act; *Simpson v. South Staffordshire Waterworks Co.*, 11 Jur., N. S. 453; 34 L. J., Ch. 380.

Acts of Parliament authorizing the construction of waterworks for supplying towns with water, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves.

The Act extends "only to such waterworks as shall be authorized by any Act of Parliament hereafter to be passed, which shall declare that this Act shall be incorporated therewith; and all the clauses of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, with the clauses of every other Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act." (Sect. 1.) The term "*special Act*" is defined (sect. 2) to mean "any Act which shall be hereafter passed authorizing the construction of waterworks, &c. and with which this Act shall be incorporated." By the same section the word "prescribed," used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if instead of the word "*prescribed*," the expression "prescribed for that purpose in the special Act" had been used: and the expression "*the lands and streams*"¹ shall mean the lands and streams of water which shall, by the special Act, be authorized to be taken or used for the purposes thereof; and the expression "*the undertaking*" shall mean "the waterworks and the works connected therewith by the special Act authorized to construct the waterworks."² "Water-rate" is

¹ By sect. 3, "*lands*" includes "messuages, lands, tenements and hereditaments, or heritages of any tenure;" "*streams*" includes "springs, brooks, rivers, and other running waters." The Act places the taking of streams on the same footing as the taking of land

under 8 & 9 Vict. c. 18; see *Ferrand v. Bradford (Mayor of)*, 21 Beav. 412; 2 Jur., N. S. 175.

² Sect. 3 defines "*waterworks*" to mean "the waterworks and works connected therewith, by the special Act authorized to be constructed."

defined by sect. 3 to include "any rent, reward or payment to be made to the undertakers for a supply of water."

This statute was amended by the 26 & 27 *Vict. c. 93*, *Waterworks Clauses Act, 1863*,¹ sect. 1 of which, after reciting the Act of 1847, states that "sundry provisions of the like nature, but not comprised in the said Act, are now frequently introduced into Acts of Parliament relating to waterworks, and it is expedient to comprise such last-mentioned provisions also in one Act;" and sect. 2 of which provides that the terms used in the Act shall have the same meaning as the same terms when used in *The Waterworks Clauses Act, 1847*, and the provisions as to the recovery of penalties contained therein are incorporated with this Act.²

*The Lands Clauses Consolidation Act, 1845*³ (8 *Vict. c. 18*), consolidates the provisions usually introduced into Acts relative to the purchase of land for public purposes. By sect. 1, it applies "to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking." It enacts that "this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking

¹ An Act for consolidating in one Act certain provisions frequently inserted in Acts relating to Waterworks.

² By sect. 1, "The two Acts may be cited together as the Waterworks Clauses Acts, 1847 and 1863." For decisions on points connected with these Acts, cf. *Atkinson v. Gateshead Waterworks Co.*, 2 Ex. Div. 44; *Bush v. Trowbridge Waterworks Co.*, L. R., 10 Ch. 459; *Metropolitan Board of Works v. New River Co.*, 37 L. T., N. S. 124; *Edgemore Highway Board v. Colne Valley Water Co.*, 46 L. J., Ch. 889; *New River Co. v. Mather*, L. R., 10 C. P. 462; see *post*, note (3), p. 318, and note (3), p. 322. See, too, *Hildreth v. Adam-*

son, 8 W. R. 470.

³ An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the taking of Lands for undertakings of a public nature. The preamble states the expediency of comprising in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for works of a public nature, and to the compensation to be made for the same, "and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for insuring greater uniformity in the provisions themselves." (Sect. 1.)

“authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed therewith as forming one Act.” Section 2 defines “special Act” to mean “any Act which shall be hereafter passed which shall authorize the taking of lands for the undertaking to which the same relates, and with which this Act shall be so incorporated as aforesaid;” and section 5 provides the form in which portions of the Act may be incorporated with other Acts.¹

The Lands
Clauses Con-
solidation
Acts, 1860
and 1869.

The Com-
panies Clauses
Consolidation
Acts.

The Acts amending this enactment, and cited with it, are *The Lands Clauses Consolidation Acts of 1860 and 1869* (23 & 24 Vict. c. 106, and 32 & 33 Vict. c. 18).

The Companies Clauses Consolidation Acts of 1845, 1863, and 1869 (8 Vict. c. 16,² 26 & 27 Vict. c. 118,³ 32 & 33 Vict. c. 48),⁴ consolidate the law regulating the constitution of companies incorporated for carrying on undertakings of a public nature.

Rights of
water com-
panies.

Of the powers of companies incorporating these statutes, the authors of “The Law relating to Gas and Water,” write:—“Thus authorized, a company may take

¹ “Prescribed,” is defined, as in the Waterworks Clauses Act, 1847, sect. 2. The same sect. defines “the works” or “the undertakings” to mean the works or undertakings of whatever nature which shall by the special Act be authorized to be executed, and “the promoters of the undertaking” to include the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking. “Land” includes “messuages, lands, tenements, and hereditaments of any tenure.” (Sect. 3.) By sect. 6, power is given to promoters of undertakings to purchase lands by agreement, and sect. 7 enables parties under a disability to sell and convey. For decisions on points connected with these

Acts, cf. *Stone v. Corporation of Yeovil*, 2 C. P. D. 99; *Bush v. Trowbridge Water Co.*, L. R., 10 Ch. 459; *North Eastern Railway Co. v. Elliot*, 6 Jur., N. S. 817; *New River Co. v. Midland Railway Co.*, 36 L. T., N. S. 529; see note (3), p. 318, and note (3), p. 322.

² An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of Companies incorporated for carrying on undertakings of a public nature.

³ An Act for consolidating in one Act certain provisions frequently inserted in Acts relating to the construction and management of Companies incorporated for carrying on undertakings of a public nature.

⁴ An Act to amend The Companies Clauses Act, 1863.

“compulsorily lands and streams, subject to the provisions
 “and restrictions of the Lands Clauses Act in exercising
 “such powers. The undertakers must make to the owners
 “and occupiers of and all other parties interested in any
 “lands or streams taken or used for the purposes of the
 “special Act, or injuriously affected by the construction or
 “maintenance of the works thereby authorized, or other-
 “wise by the execution of the powers thereby conferred,
 “full compensation for the value of the lands and streams
 “so taken or used, and for all damage sustained by such
 “owners, occupiers and other persons by reason of the
 “exercise, as to such lands and streams, of the power vested
 “in the undertakers.”¹ The amount of the compensation
 is to be determined, and the payment enforced in the
 manner provided by the Lands Clauses Consolidation Acts.
 For the purpose of constructing waterworks, the under-
 takers may enter upon the lands and places described on
 the plans² and in the books of reference, and may take
 the levels and set out parts thereof, and dig and break up
 the soil, and trench and sough the same, and remove and
 use earth, stone, mines, minerals, trees, and other things.
 They may sink wells,³ make, maintain, alter, or discontinue
 reservoirs, waterworks, cisterns, tanks, aqueducts, drains,
 cuts, sluices, pipes, culverts, engines, and other works, and
 erect buildings; they may also divert and impound water
 from the streams mentioned for that purpose in the special
 Act or the plans or books of reference, and alter the course
 of such streams not being navigable, and take such waters
 as may be found in and under or on the lands to be taken
 for constructing the works. In the exercise of these
 powers, the undertakers are to do “as little damage as can
 “be; and in all cases where it can be done, they are to pro-
 “vide other watering places, drains, and channels for the

¹ Michael & Will, p. lviii *et seq.* The introduction contains a summary of the powers and duties of water companies.

² Errors, misstatements, and wrong descriptions of any lands, streams, or the owners, lessees, or

occupiers thereof, on the plans or books of reference may be corrected before the justices subject to the conditions prescribed by the Act.

³ See as to this point, *South Shields Waterworks Co. v. Cookson*, 5 L. J., Ex. Ch. 315.

“ use of adjoining lands in place of any such as shall be
 “ taken away or interrupted by them, and are to make full
 “ compensation to all parties interested for all damage sus-
 “ tained by them through the exercise of such powers.”¹
 Provision is made for the settlement by justices of differences as to the construction of accommodation works, for cases where the undertakers take land containing minerals or interfere by the works with the working of mines, and for the mode in which streets are to be broken up² for the purposes of laying pipes.³

¹ Michael & Will, p. lviii *et seq.* Unless otherwise authorized by their special Act, the undertakers must not deviate from the line of the works laid down in the plan more than ten yards when constructing their waterworks, nor may they lay down any pipe or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof.

² As to sects. 48 and 52 of 10 & 11 Vict. c. 17, on this point, see *Glover v. East London Waterworks*, 16 W. R. 310; 17 L. T., N. S. 475, C. P.; and as to minerals, see *Huddersfield Corporation and Jacomb, In re*, 17 L. R., Eq. 476; 30 L. T., N. S. 78; 31 L. T., N. S. 466.

³ Michael & Will, p. lviii *et seq.* For the rights and duties generally of bodies exercising statutory powers, see *ante*, p. 261 *et seq.*; it will be useful here, however, to note some of the leading decisions relative to the rights and liabilities of water companies which, while prevented by the law from unduly trenching on the rights of the public, are at the same time protected from harassing actions by individuals which otherwise interfere with the discharge of their functions. The mere fact that the breach of a statutory duty has caused damage, does not vest a right of action in the person suffering against the person guilty of the breach. This is regulated by the wording and object of each statute.

In *Atkinson v. Gateshead Water Co.*, 2 Ex. Div. 441, the plaintiff

brought an action for damages against the company for not keeping their pipes charged as required by their Act, whereby his premises were burnt down. Under the Waterworks Clauses Act, 1847, the company were bound—(1) to maintain fire plugs, sects. 33—43; (2) to furnish a sufficient supply of water for certain public purposes, sect. 37; (3) to keep pipes to which fire plugs are affixed at a certain pressure at all times, and to allow all persons to use it for extinguishing fire at all times, without payment, sect. 42. (4) To supply all owners with sufficient water for domestic purposes, sect. 35. A penalty of 10*l.*, of which one-half may be awarded to the informer, is imposed for each breach, and for breaches of duties (2) and (4) they are to forfeit 40*l.* a day, sects. 37 and 43:—Held (reversing the decision of the Court of Exchequer), that the statute gave no right of action. Per Cockburn, C. J., “If any person is injured by “a breach of such duty, he must “have recourse to the statutory “remedy, and cannot maintain an “action for damages.” See, too, *New River Co. v. Johnson*, 6 Jur., N. S. 374; *Blagrove v. Bristol Waterworks Co.*, 1 H. & N. 369; 26 L. J., Ex. Ch. 57; *Barber v. Nottingham and Grantham Rail. Co.*, 15 C. B., N. S. 726; 33 L. J., C. P. 193.

A water company had laid mains along a turnpike road under an Act which declared the soil to be in the owners on each side. On an action being brought by a firm who had

Rights and liabilities of water companies.

On the other hand, as respects the rights of the public, Rights of
 "Owners and occupiers are entitled to demand a supply the public.

contracted with K., owner of the soil on both sides, to make a cut through the embankment on which the road and pipes were carried over his soil for the stoppage of their works by an escape of water from the company's pipes; it was held that, assuming K., the owner, could have maintained an action against the defendants (as to which the Court gave no opinion), the plaintiffs could not. "If we did so" (*i.e.* held defendant liable), we "should establish an authority for saying that in such a case as *Fletcher v. Rylands*, the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools destroyed, but to an action by every workman employed in the mine, who in consequence of its stoppage made less wages." *Blackburn, J.; Cattle v. Stockton Water Co.*, L. R., 10 Q. B. 453.

An Act, incorporating The Waterworks Clauses Act, 1847, empowered the Trowbridge Water Company to divert the water of certain springs forming the principal supply of a brook. The owner of a water meadow below through which the brook subsequently flowed, alleged by bill that the water was materially diminished, and prayed that defendants might be restrained and compelled to treat for the purchase of her interest under the 18th clause of The Lands Clauses Act. It was held, that not being an owner of anything "taken" under the Act, she could not compel defendants to treat for purchase, and her proper remedy was to apply for compensation for lands injuriously affected. James, L. J., said, "I am of opinion that it is impossible in any legal or other sense of the words to say that she was the owner or occupier of anything which they entered on or took. They entered on the channel or bed of a stream somewhere above plaintiff's land, and there they took

"by way of diversion water for purposes of their waterworks, which water, to put the case in the highest for the plaintiff, would in due course, if they had not so diverted it, have gone down to her land, and would then and so long as it was over her land, be water of which she was the owner and occupier in the sense in which a person is the owner or occupier of a stream running through his land, that is to say, the water would have then become within the ownership, and, to some extent, within the occupancy of the plaintiff. But when it was intercepted by defendants just as if it had been intercepted by any other riparian proprietor, although it might have become part of her property, the water which was actually intercepted was not her property;" *Bush v. Trowbridge Water Co.*, L. R., 10 Ch. 459. See, too, *Simpson v. South Staffordshire Waterworks Co.*, 11 Jur., N. S. 453; 34 L. J., Ch. 380; 13 W. R. 729; *A.-G. v. Bristol Waterworks*, 10 Ex. Ch. 884; 24 L. J., Ex. Ch. 205.

In *Waller v. Mayor of Manchester*, 6 H. & N. 667, the defendants were empowered to construct a reservoir, but were not to divert the waters of the river Etherow till it was completed. They were to discharge seventy-five cubic feet of water per second for twelve hours a day under 50% penalty, and they were not to divert any water from the river Etherow till they had commenced to discharge seventy-five feet per second. Defendants made a reservoir which, through engineering difficulties, was never completed, but they diverted the waters of the river Etherow in 1857, and supplied certain quantities less than seventy-five feet. In 1860, the plaintiff, a mill-owner, brought an action—1st count, for diverting the water; 3rd and 4th counts, claiming damages from the defendants for not

“of water for domestic purposes,¹ only where they have
“laid down communication pipes, and paid or tendered

supplying seventy-five cubic feet. —Defendants paid money into Court as to the 1st count; as to the 3rd and 4th they pleaded that the reservoir had not been finished so as to make it their duty to supply the water:—Held, that the plea was good, and the plaintiffs were only entitled to damages for the diversion of the water, and not for the non-discharge of seventy-five feet from the reservoir. “The plaintiffs did not think fit to interfere by mandamus or injunction, but suffered the defendants to intercept the water for more than six years. Under the circumstances plaintiffs are only entitled to damages for getting less water from the natural stream.”—Pollock, C. B.

By sect. 41 of the New River Company's Act, the company shall at the request of any consumer of water for purposes other than those in respect of which rates are charged afford a supply by means of a meter, and charge the same at certain limited rates. The Metropolitan Board of Works demanded a supply of water by meter to water the Victoria Embankment during one-third of the year only:—Held, that the defendants were not bound to supply it at the limited rates, but might claim rates fixed by sect. 37 of the Waterworks Clauses Act, 1847; *Metropolitan Board of Works v. New River Co.*, 37 L. T., N. S. 124.

With regard to the charges of water companies, it may be noted here that rent has been held to mean actual value where payment of rents is dependent on it. In *Sheffield Water Co. v. Bennett* (L. R., 8 Ex. 196, 1873) the defendant was the owner of various tenements, for which he paid poor rates, water rates, &c. By their Act the plaintiffs were bound to supply houses within a certain district with water at following rate per annum—i. e., where the rent was 7*l.*, at not exceeding 6 per cent. Held, that in

estimating the rents, defendant was entitled to deduct the rates so paid by him (affirming the same case in L. R., 7 Ex. 409). See, too, *Sidebottom v. Glossop Reservoir*, 1 Ex. Ch. 611, Ex. Ch.; *Rook v. Liverpool (Mayor of)*, 7 C. B., N. S. 240.

Sect. 43 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), enacts that, “if, except “when prevented as aforesaid “(that is to say, by frost, unusual “drought, or other unavoidable “cause or accident, or during “necessary repairs (sect. 42)), the “undertakers neglect or refuse to “furnish to any owner or occupier “entitled under this or the special “Act to receive a supply of water “during any part of the time for “which the rates for such supply “have been tendered, they shall “be liable to a penalty of 10*l.*, “and shall also forfeit to every “person having paid or tendered “the rate, the sum of 40*s.* for “every day during which such “refusal or neglect shall continue “after notice in writing shall have “been given to the undertakers of “the want of supply.” By sect. 74 of the same statute, it is provided that “if any person supplied “with water neglect to pay the “water-rate, the undertakers may “stop the water from flowing into “the premises, by cutting off the “pipe to such premises, or by such “means as the undertakers shall “think fit.”

A tenant of premises supplied by a company with water having failed to pay the water-rate, the company, under the powers conferred on them by sect. 74, severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the

¹ As to what are “domestic purposes,” see *Busby v. Chesterfield Waterworks*, El. Bl. & El. 176; 27 L. J., M. C. 174, and *ante*, Chap. III. p. 116.

“ the water rate ¹ payable in respect thereof. Any owner
 “ or occupier wishing to have water from the waterworks
 “ brought into his premises is empowered by the Act of
 “ 1847, upon paying or tendering the portion of water
 “ rate in respect of such premises, by that or the special
 “ Act directed to be paid in advance, to open the ground
 “ (having first obtained the consent of the owners and
 “ occupiers thereof) between the pipes of the company and
 “ his premises, and lay any leaden or other pipes from
 “ such premises, to communicate with the pipes of the
 “ undertakers. . . . The connection of the service
 “ pipes with the company’s pipes must be made under the
 “ superintendence of their surveyor, and two days’ notice
 “ of the hour and day when such connection is to be
 “ made, must be given to the company. . . . Any
 “ person who either has laid down service pipes, or has
 “ become the proprietor of them, is entitled to remove the
 “ same at any time after giving six days’ notice in writing
 “ to the company; and he must make compensation to the
 “ company for any injury or damage to their pipes or
 “ works caused by such removal. . . . For the
 “ purpose, whether of laying or of removing such service
 “ pipes, any owner or occupier is entitled to open or break
 “ up so much of the pavement of any street as shall be
 “ between the pipes of the company and his house, build-

same premises, tendering to the company the current quarter’s rate, and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under sect. 43 of the Act for such refusal, it was held that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by sect. 43 until he himself had restored the communication

with their main pipes; *Sheffield Waterworks Co. v. Wilkinson*, 4 C. P. D. 411. See, too, *Purnell v. Wolverhampton New Waterworks Co.*, 10 C. B., N. S. 576; *Weale v. W. Middlesex Waterworks Co.*, 1 J. & W. 358; *West Middlesex Waterworks Co. v. Suerkrop*, 4 C. & P. 87; *Cardiff (Mayor of) v. Cardiff Waterworks Co.*, 5 Jur., N. S. 953; *Bateman v. Ashton-under-Lyme*, 27 L. J., Ex. Ch. 458; 3 H. & N. 323.
¹ Sect. 3 of 10 & 11 Vict. c. 17 defines “water-rate” as “any rent, reward, or payment to be made to the undertakers for a supply of water.” See *Sheffield Waterworks Co. v. Wilkinson*, *supra*.

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“ing, or premises, or any sewer or drain therein,” but doing as little damage as possible. The owners of all dwelling houses, or parts of dwelling houses, occupied as separate tenements, where the annual value does not exceed 10%, are liable to the payment of the water rates, instead of the occupiers thereof.¹

Parts of towns and districts not supplied with water are empowered to demand a supply from companies under the Act of 1847, if they comply with certain regulations; and a penalty is imposed on the company on their neglect or refusal to supply. The undertakers are bound to keep a supply of water for public purposes, such as fire plugs, cleansing sewers, drains, &c., and for supplying public pumps. They are also authorized to provide a supply for trade and other purposes; and special regulations are made for the case where companies are employed to supply by meter. The Act of 1847 entitles them to the payment of water rates by those requiring a supply of water; but it also strictly limits their profits.² By both the Water Works Clauses Acts, the waste of water is prohibited by strict provisions.¹ The undertakers are required to keep a copy of their special Act at their office, and to deposit another with the clerk of the peace or sheriff clerk as aforesaid, for the inspection of all persons interested therein.³

¹ Michael & Will, pp. lviii *et seq.*

² It is provided, “that the profits “to be divided among the undertakers in any year shall not exceed 10 per cent. on the paid-up capital, unless a larger dividend be at any time necessary “to make up the deficiency of any “previous dividend which shall “have fallen short of that rate;” Michael & Will, p. lxviii.

³ Some of the principles regulating the *duties* of water companies may be here conveniently noticed. It is a primary duty where persons are by an Act of Parliament incorporated for a special purpose with full powers for executing it, that the body

thus created should from time to time take measures to prevent the occurrence of any inconvenience or injury which the effecting such purpose may occasion, not only in the original execution of the necessary works, but at recurring intervals.

Thus, where a company incorporated for supplying mill-owners on the Bann were empowered to make a reservoir, and to send the water, when necessary, down a special channel, and also to enter on the lands of different streams, and to scour the channels, it was held, that they were responsible for damage caused by an overflow arising from their neglecting to keep the special channels scoured,

Such are a few of the main provisions relating to companies having parliamentary powers. We go on to notice more briefly—

(2) *Companies having no parliamentary powers.*—Where Companies having no

since they were bound under the Act to see that the due execution of their works should not be injurious to the lands on the banks of the channel; *Geddis v. Bann Reservoir*, 3 App. Cas. 430. See *ante*, p. 266.

So, too, it is incumbent (under the Waterworks Clauses Act, 1847, sect. 31) on a water company intending to break up roads to communicate beforehand the plan to the road authority, and this is sufficient to enable the road authority to judge whether it requires any modification, and it rests with the water company, in case of its disapproval, to apply for the determination of two justices before proceeding to commence operations; *Edgemore Highway Board v. Colne Valley Water Co.*, 46 L. J., Ch. 889.

With regard to questions of compensation for injuries to land which may arise with reference to the Lands Clauses Act, 1845, a company would appear to be bound by the terms of their agreement, even though they fail to carry them out in entirety. On this point *Stone v. Corporation of Yeovil* (2 C. P. D. 99) is instructive. There the defendants, a water company, were empowered by an Act incorporating the Lands and Waterworks Clauses Acts to take, use and divert certain streams, and, amongst others, that of the plaintiff, a mill-owner. Defendants gave plaintiff notice of their intention to take all the stream, but actually took half only. To a statement of claim by the plaintiff for 939*l.* permanent damages awarded to him by a surveyor for the abstraction of the whole stream, the defendants demurred, on the ground that they had no power to agree to make compensation for all the stream, but only for such damage as was done from time to time. It was

held, however (affirming the decision in the Common Pleas Division), that they had such power, and that, having given notice of an intention to purchase the whole, they were bound to make compensation at once for all the interest of the mill in the stream. It was further held that, if the case was to be considered as one of injuriously affecting property, the statement showed a good agreement by a limited owner for permanent injury under sects. 9 and 68. In cases of disputes regarding the payment of rates, sect. 68 of the Waterworks Clauses Act, 1847, provides that the question of annual value is to be determined by two justices.

This provision would appear to override anything to the contrary in any private Act incorporating it. Sect. 46 of the New River Act, which incorporates the Waterworks Clauses Act, enacted "that nothing in this Act, or any Act incorporated therewith, is to prevent the company from recovering any sum not exceeding 50*l.*, due as water rates, &c., by an action as provided." But it was held in *The New River Co. v. Mather* (L. R., 10 C. P. 442), that where a *bonâ fide* dispute as to value arises, the company, before they can sue, must obtain a decision of justices.

Closely connected with the duty incumbent on companies to prevent injury, noticed above (*Geddis v. Bann Reservoir*, 3 App. C. 430), is the question of responsibility for mischief caused through negligence.

In an action against a water company for so managing their pipes that they burst, and, water escaping, injured the plaintiff's premises, it was shown that there was an extraordinary frost, and that the turncock had examined the

parliamentary powers. such bodies undertake to supply water it is to be noted that they lay their pipes in streets and public ways at

plug, and packed it with straw and ice on the 29th November: it was doubtful, however, whether he had looked at it after. It burst on the 29th December. Held, that there was some evidence of negligence to go to the jury; *Steggles v. New River Co.*, 13 W. R. 413.

In *Harrison v. South Western Rail. Co.* (10 Jur., N. S. 992) the defendants were charged with the duty of repairing a drain, the outlet of which was in a channel under the management of commissioners bound to keep it clear, and of certain dimensions. Owing to an extraordinary rainfall, the drain burst, and it was held that defendants were liable, although there was an obligation on others which they did not perform; Pollock, C. B., observing, *inter alia*, that "there was nothing in the matter of so extraordinary a character as that the defendants were not bound to anticipate it. The storm, though unusual and extraordinary in a sense, yet as happening once a year, or in a few years, was not unusual. This is not a case of a sudden wrong done by others in stopping the outlet. It is a permanent long-continuing state of things which it was the duty of defendants to guard against."

In order to meet the charge of negligence, a plea must be express and not too general. Thus where damages were claimed by a plaintiff from the East London Waterworks Company for neglect in supplying him with water, they being bound, under sect. 79 of their Act, to supply water by measure at the request of owners of premises for purposes other than those in respect of which rates were paid, it was pleaded by the company:

1st. That the fire-plug in the main pipe was open to put out a fire.

2nd. That they were prevented by an unavoidable accident.

It was held on demurrer that the first plea was a good answer, but the second was bad, as too general; *Campbell v. East London Waterworks*, 26 L. T., N. S. 475.

Where, however, a water company have observed the directions in their Act of Parliament in laying down their pipes, they are not liable for an escape of water not caused by their own negligence, and the fact that their precautions were not sufficient in an exceptional circumstance (as, for instance, a winter of extreme cold, such as no man could have foreseen), will not render them so; *Blyth v. Birmingham Water Co.*, 11 Ex. 781. As to *vis major*, see *ante*, p. 138 *et seq.*

Again, no action at common law lies against the owner of land by a person who has strayed from the public highway, and fallen into a reservoir or any excavation near to but not substantially adjoining it; *Hardeastle v. South York Rail. Co.*, 4 H. & N. 67.

A company claiming a statutory power to take land compulsorily is bound to prove distinctly from the Act of Parliament the existence of the power, and where there is a doubt, the landowner is to have the benefit of it. When, as is often the case, a special Act incorporates a general Act, it is to the special Act that reference must be made in order to ascertain the contract between the land-owner and the company. A water company incorporated by a special Act incorporating the Lands and Waterworks Clauses Acts deposited plans showing their intention to make a tunnel through the plaintiff's land forty-five feet below the surface. They also claimed to hold the land permanently for other purposes, namely, to erect steam engines and sink wells. Held, per Lord Westbury, L. C., they were not entitled to do so; *Simpson v. South Staffordshire Waterworks*, 11 Jur., N. S. 453; 34 L. J., Ch. 380.

It may be convenient to note

their peril, being liable to an indictment or action for damages, joined with a claim for an injunction at the instance of any individual whenever they break up or obstruct a highway. They have also no power to acquire lands and water, or to levy tolls or charge rates or rents, save by agreement.¹

Both projected companies and those already existing¹ can, however, by means of *The Gas and Water Facilities Act*, 1870 (33 & 34 Vict. c. 70),² obtain certain powers for supplying water.

Sect. 3 provides that the Act may apply where powers are required "to construct or to maintain and continue water-works and works connected therewith, or to supply water in any district within which there is not an existing company, corporation, body of commissioners, or person empowered by Act of Parliament to construct such works and to supply water" (sub-sect. 2). By sub-sect. 3 additional capital can be raised for any of these purposes, and under sub-sect. 4, "two or more companies or persons duly authorized to supply gas or water in any district, or in adjoining districts," may "enter into agreements jointly to furnish such supply, or to amalgamate their undertakings." Lastly, by sub-sect. 5,

here that the principle that a grantor knowing the purposes for which his conveyance is accepted cannot derogate therefrom, applies to a compulsory sale by Act of Parliament; but that such principle does not apply to an accidental state of circumstances, such as the flooded state of a mine at the time of the conveyances; *N. E. Rail. Co. v. Elliot*, 6 Jur., N. S. 817; 10 H. L. Cas. 333.

It would appear that a water company has no right to interfere with the sale of water for a profit so supplied by them to a township, where the agreement merely stated that the company should supply not more than 75,000 gallons, nor less than 25,000, and the township took more than 25,000 gallons,

and sold the surplus; *Halifax v. Soothill*, 31 L. T., N. S. 6.

It has been decided that a water company has no claim to compensation for interest in land under sect. 68 of the Lands Clauses Act, 1845, because their pipes are laid under such land; *New River Co. v. Midland Rail. Co.*, 36 L. T., N. S. 539. See, too, *Ward v. Wolverhampton Waterworks Co.*, 41 L. J., Ch. 308; *Clowes v. Staffordshire Potteries Waterworks Co.* 27 L. T., N. S. 521.

¹ Michael & Will, p. lvi.

² "An Act to facilitate in certain cases the obtaining of powers for the construction of Gas and Waterworks, and for the supply of Gas and Water."

“two or more companies or persons supplying gas or water in any district, or in adjoining districts,” can be authorized “to manufacture gas or to supply water, and to enter into agreements jointly to furnish such supply and to amalgamate their undertakings.” “Such purposes, or any one or more of them, as the case may be, shall, for the purposes of this Act, be deemed to be included in the term ‘gas undertaking,’ or ‘water undertaking,’ according as the same relate to the supply of gas or water; provided that any gas or water company empowered as aforesaid may apply for and avail themselves of the facilities of this Act within their own districts respectively.”

Provisional orders (to be subsequently confirmed by Parliament (sect. 9)) can be obtained in any district by any company, association, or person for carrying out the above purposes (sect. 4), the Board of Trade being empowered to consider any application or objection thereto (sect. 6), and if it be deemed expedient to make the provisional order. The *Waterworks Clauses Acts*, 1847 and 1863, and the *Lands Clauses Consolidation Acts* of 1845 and 1860, are, by sect. 10,¹ to be incorporated with such provisional order, save where varied thereby.

This enactment was amended by 36 & 37 *Vict. c. 89* (*The Gas and Waterworks Facilities Act*, 1870, *Amendment Act*, 1873),² by sect 12 of which the Board of Trade may amend and extend or vary provisional orders, and by sect. 15 of which the Act is not to extend to the metropolis as defined by *The Metropolis Management Act*, 1855.

It remains to notice a few points respecting—

(3) *Local authorities empowered to supply water.*—10 & 11 *Vict. c. 34* (*The Towns Improvement Clauses Act*, 1847)³

Local authorities supply-
ing water.
10 & 11 *Vict.*
c. 34.

¹ Cf. sect. 1 of 33 & 34 *Vict. c. 70*. Sect. 10 excepts, so far as regards the incorporation of the *Lands Clauses Consolidation Acts*, the provisions (1) with respect to the purchase and taking of lands, otherwise than by agreement; and (2) with respect to the entry upon lands by the promoters of the

undertaking.

² “An Act to amend the provisions of the *Gas and Waterworks Facilities Act*, 1870.”

³ “An Act for consolidating in one Act certain provisions usually contained in Acts for paving, draining, cleansing, lighting, and improving towns.”

made some provision in this respect (sects. 121—124), and incorporated *The Lands Clauses Consolidation Act*, 1845 (sect. 19). It was, however, superseded as regards water by 11 & 12 *Vict. c. 63* (*The Public Health Act*, 1848),^{11 & 12 *Vict. c. 63.*} under which local authorities were empowered under certain circumstances and conditions to supply their districts with a proper and sufficient supply of water for the purposes of the Act, and might, for that purpose, contract from time to time with any person whomsoever, or purchase, take on lease, hire, construct, lay down and maintain such waterworks, and do and execute all such works, matters and things as may be necessary for those purposes (sects. 75—80). Local authorities might, by agreement, purchase land, and the Act incorporated *The Lands Clauses Consolidation Act*, 1845 (sect. 48), excepting such enactments as related to the purchase and taking of lands otherwise than by agreement.¹

These powers were supplemented by 21 & 22 *Vict. c. 98* (*The Local Government Act of 1858*),² which (by sect. 75) incorporated the whole of the *Lands Clauses Consolidation Act*, except the provisions relating to access to the special Act; and provided the machinery for enabling local authorities to put in force the powers of that Act, as regards the compulsory acquiring of land, by obtaining a provisional order, to be afterwards confirmed by Parliament. This Act was further amended by 24 & 25 *Vict. c. 61*.^{21 & 22 *Vict. c. 98.*}

*The Sanitary Acts of 1866 and 1874*³ extended to sewer authorities the powers given to local boards; the latter statute incorporating the powers of the *Lands Clauses Act*, and authorizing sanitary authorities to purchase, either within or without their districts, any land covered with<sup>29 & 30 *Vict. c. 90;*
37 & 38 *Vict. c. 89.*</sup>

¹ Cf. Michael & Will, p. lxviii.

² "An Act to amend the Public Health Act, 1848, and to make further provisions for the local government of towns and populous places." Sects. 51—53 deal specially with water. The Act was

amended by the Local Government Act, 1858, Amendment Act, 1861 (24 & 25 *Vict. c. 61*).

³ 29 & 30 *Vict. c. 90*, Sanitary Act, 1866 (ss. 11—13); 37 & 38 *Vict. c. 89*, the Sanitary Law Amendment Act, 1874.

water, or any water, or right to take or convey water¹ (sects. 31—33).

38 & 39
Vict. c. 55.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), repeals all the statutes noticed above, consolidating, and, in some respects amending, the law.²

By sect. 51, urban authorities may provide their district or any part thereof, and any rural authorities may provide their districts or any contributory place therein, or any part of such place, with “a supply of water proper and “convenient for public and private purposes,” and for those purposes or any of them may—

(1) Construct and maintain waterworks, dig wells, and do all other necessary acts;

(2) Take on lease or hire any waterworks, and, with the sanction of the local government board, purchase any waterworks or any water or right to take or convey water either within or without their district, and any rights, powers, and privileges of any water company; and

(3) Contract with any person for a supply of water.³

Local authorities are given full powers (sects. 175—181) to purchase lands and easements by agreement, for the purposes of the Act, either within or without their districts, but must obtain a provisional order for the purpose (sect. 176), unless they have acquired by agree-

¹ But the compulsory powers of purchase contained in the said Lands Clauses Act shall not be exercised, except in pursuance of a provisional order of the Local Government Board (sect. 33).

² Michael & Will, pp. lxxiv—lxxxiii.

³ Their powers are, however, limited in that where there exists a water company empowered by Act of Parliament, or any order confirmed by Parliament, to supply water within the district of the local authority, and exercising such powers within the limits of their special Act, local authorities must

give written notice to any such water company, within whose limits of supply they are desirous to supply water, before beginning to construct; and so long as any company are able and willing to supply water, proper and sufficient for all reasonable purposes for which it is required by the local authority, it is not lawful for the latter to construct any waterworks within such limits (sect. 52). Differences as to being able and willing to supply to be settled by arbitration; see sects. 52 and 179—181; and cf. sects. 53, 54, for provisos as to notice.

ment the necessary lands and easements for their waterworks; and in order to do this they must publish the same notices by advertisement in the local papers, and serve the same notices on owners, lessees, and occupiers, as if they were proceeding for an Act of Parliament (sect. 176).¹ Water companies are empowered to contract to supply water, or lease their waterworks to any local authority, or to sell and transfer to such authority on such terms as may be agreed on all the rights, powers, privileges, and all or any of the waterworks, premises, and other property of the company, but subject to all liabilities to which the same are subject at the time of such purchase. The duty of providing a pure and wholesome supply of water is imposed on local authorities (sects. 55, 176), and they have now all the powers of *The Waterworks Clauses Act*, 1863, and many of those of *The Waterworks Clauses Act*, 1847,—such, for instance, as those relating to the breaking up of streets for the purpose of laying pipes, the laying of communication pipes, and the waste and misuse of water and recovery of water rates.²

¹ Sect. 4 defines “lands” as “messuages, buildings, lands, easements, and hereditaments of any tenure;” but as this definition does not include water rights, local authorities must obtain a private Act, and not a provisional order, where their intended waterworks involve the abstraction of water from rivers, streams, &c.; sect. 176; see Michael & Will, pp. lxxvii, 444.

² The following provisions are noteworthy:—They may supply water by measure (sect. 58), and supply baths and washhouses (sect. 65). The duty is imposed on them of supplying fire-plugs (sect. 66), and watering streets (sect. 148). Sect. 64 vests in them all existing public cisterns, pumps, wells, &c., and places them under their control; and sect. 61 empowers local authorities to supply water to the districts of other authorities. See also

sects. 68—70, as to provisions for the protection of water; sects. 270 and 279, as to the formation of united districts for water supply; and sects. 229, 277, as to special drainage districts, for the purpose of charging thereon exclusively the expense of works; cf. Michael & Will, pp. lxxv—lxxxviii.

By sect. 52, it is required that a water company, contracting to supply a district, must be both “able and willing;” and such company must be able therefore to show not only that it has the necessary powers, but also that it can furnish the requisite supply of water. Where there were two companies, one of which had powers, but no water, and the other water, but no powers, and the first company sold its plant, &c. to the other, several members of which bought all the shares in the first, with the view of exercising all its

The above brief sketch of the statutes dealing with water supply may be fitly concluded by a mention of the following enactments which are connected with the subject.

Other enact-
ments.

14 & 15
Vict. c. 34.

14 & 15 *Vict. c. 34* (*The Labouring Classes Lodging Houses Act*, 1851) authorizes water companies and commissioners or trustees of waterworks or other persons having the management thereof, to supply in their discretion water to lodging houses established under the Act, "either without charge, or on such other favourable terms as they shall think fit."¹

35 & 36
Vict. c. 91.

35 & 36 *Vict. c. 91* (*The Municipal Corporations (Borough Funds) Act*, 1872) provides for the manner in which local authorities must proceed in order to oppose or promote any bill in Parliament.²

38 & 39
Vict. c. 86.

38 & 39 *Vict. c. 86* (*The Conspiracy and Protection of Property Act*, 1875) is noteworthy as containing provisions to protect local authorities and communities from malicious breaches of contract in connection with water supply.³

40 & 41
Vict. c. 31.

The Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 *Vict. c. 31*), enables landowners of limited interests to construct waterworks and charge their estates with sums expended by them thereon, as well as to charge their estates with sums subscribed by them for the construction of waterworks by a water company, on the same conditions and terms as those on which they can now charge them with subscriptions for the construction of railways and navigable canals under *The Improvement of Land Act*, 1864, *sects. 6, 7, 8, &c.*⁴

Rateability.

The rateability of water companies will be treated of in a subsequent chapter.⁵

powers, it was held that such powers could not be so delegated; *Richmond and Southwark Waterworks Co. v. Richmond Vestry*, 3 Ch. D. 82.

¹ Michael & Will, p. lxvi.

² *Ib.* p. lxxxiv.

³ *Ib.* p. lxxxiii. "An Act for amending the Law relating to Conspiracy and to the Protection of Property, and for other purposes;" *sects. 4, 5, 14, 15, 18, 19.*

⁴ 27 & 28 *Vict. c. 114.*

⁵ See *post*, Chap. IX.

III. *Docks.*

Docks¹ usually consist of a series of basins connected by locks, together with quays, wharves, and warehouses, and are used for the convenience of unloading cargoes from vessels, as well as for refitting and repairing ships that have sustained damage during a voyage. Definition.

Though they are always erected in connection with some port or harbour, they are quite distinct therefrom; the property in a port, and that in the docks situated within the town, which is the head of the port, being frequently in different persons, as is the case both in the Liverpool and the London Docks.² Ownership of.

They may be in the hands either of trustees for the public benefit,³ or of a company of adventurers;⁴ but in each case they are usually established under a special Act of Parliament, by which the rights and duties of the proprietors are defined; and when that is the case, they cannot be exceeded.⁵ When the Act is silent on this point, the public have a right to enjoy the privilege of using the docks upon "reasonable terms," and the owner cannot impose what tolls or duties he pleases on them.⁶

The number of special Acts relative to docks led to the passing of *The Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c. 27*), the preamble of which recites that, "it is expedient to comprise in one Act sundry provisions usually contained in Acts of Parliament authorizing the construction or improvement of harbours, docks, and piers, and that, as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for ensuring a greater uniformity in the provisions themselves" (s. 1.)

¹ As to docks, see also *ante*, Chap. I. p. 43.

² Gunning on Tolls, p. 129.

³ *Mersey Docks v. Gibbs*, L. R., 1 H. L. 90.

⁴ *Reg. v. Bristol Dock Company*, 2

Railw. Cas. 599.

⁵ Gunning on Tolls, p. 123.

⁶ *Albuit v. Inglis*, 12 East, 527; and see Gunning, p. 123. For the subject of dock dues, see *post*, Chap. IX.

By this statute, which is framed on the model of the Lands Clauses and Waterworks Clauses Consolidation Acts, various provisions usually contained in Acts creating dock companies are consolidated, and it extends to such "harbours, docks, and piers as shall be authorized by Acts hereafter to be passed, which shall declare that this Act shall be incorporated therewith" (sect. 1); the term "*the undertakers*" being defined by sect. 2 to mean "any person authorized by a special Act to construct any harbour, dock, or pier."¹

It is, however, to the special Act that reference must be made, to ascertain the rights of the dock proprietors; that Act constituting the form of contract between them and the public, and being regarded in the light of a bargain, any ambiguity in its terms will be construed as against the undertakers and in favour of the public.²

By Act of Parliament, the Hull Dock Company were authorized to make a dock, &c., and all goods which should be *landed or discharged* upon any of the quays, &c. should be liable to pay the like rates of wharfage as were usually taken for goods, &c. loaded or discharged on quays in the port of London. It was held, that as the premises were only vested in the company for the purposes of the Act, they had no common law right to compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays; Lord Tenterden, C. J., saying, "The plaintiffs cannot claim anything that is not distinctly given."³

Liability of
dock com-
panies.

The principle on which a private person or a company is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by

¹ For other general statutes relating to docks, see *ante*, Chap. I. p. 44; and *post*, Chap. VII.

² *Hull Dock Co. v. La Marche*, 8 B. & C. 51. See too *Leeds and Liverpool Canal v. Hustler*, 1 B. & C. 424; Lord Tenterden's remarks in *Stourbridge Canal v. Wheely*, 2

B. & Ad. 793; *Blakemore v. Glamorganshire Canal*, 1 M. & K. 162, 169; and Lord Brougham's judgment in *Stockton and Darlington Railway v. Barrett*, 11 C. & F. 590; 8 Scott, N. R. 641.

³ *Kingston-on-Hull Dock Co. v. La Marche*, 8 B. & C. 42.

statute to perform certain works (as, for instance, to erect and manage docks), and to receive tolls for the use of the works; although these tolls, unlike tolls received by a private person, are not applicable to the use of individual members of the corporation, or to that of the corporation generally, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls are themselves to be diminished. If knowledge of the existence of a cause of mischief makes persons responsible for an injury, they will be equally responsible when, by their culpable negligence, its existence is not known by them.¹

On these principles, dock trustees were held liable to the owners of ships in actions for damages caused to them by negligently managing a harbour under their control.²

In the case of *Coe v. Wise*,³ it was held, on this principle, that commissioners, authorized by Act of Parliament to make and maintain a sluice, which burst owing to the negligence of their servants, were not exempt from liability, by reason of their being commissioners for public purposes; and the duty being imposed on them to maintain the sluice, they were liable for damage caused by negligent performance of that duty of their servants.

When the Bristol Dock Company were authorized to make a new course for the river Avon, of equal depth and breadth at the bottom, and of equal inclination at the sides as the old course, it was held, that a duty was thereby cast on them generally to repair the banks of the new channel, and that a mandamus would lie to compel them, though they might also be liable to indictment. A return, that they were not liable to repair, and that, as near as circumstances permitted, they had maintained the new channel of equal depth, breadth, and inclination, was, therefore, held not sufficient.⁴

¹ *Mersey Dock Trustees v. Gibbs*, L. R., 1 H. L. 90; 11 H. L. Cas. 686; 12 Jur., N. S. 571.

² *Ib.*

³ L. R., 1 Q. B. 711, following

Mersey Dock Co. v. Gibbs, L. R., 1 H. L. 90.

⁴ *Reg. v. Bristol Dock Co.*, 2 Railw. Cas. 599.

The same company, being authorized as above, were also required by their Act to compensate persons interested in lands injured. They purchased certain lands and closes, and sold parts in lots—a strip of land being left for a public road between the new channel and the lots. A portion of the road was washed away, and the owners of houses built on the said lots applied to the company to repair the bank, but they refused. On application by the corporation of Bristol, who were conservators of the river, and on affidavit stating these facts, and also stating apprehension of injury to the navigation, though no actual injury, it was held that a mandamus should issue to compel the defendants to repair.¹

Their Act of Parliament directed the Bristol Dock Company to make a common sewer in a certain direction, &c., and to alter other sewers, so as to discharge considerably below the surface of the water of their floating harbour, and to make such other alterations, &c. in the sewers as might be deemed necessary in consequence of the floating of the said harbour. The company altered certain sewers, so as to discharge them considerably under the surface, but the sewage became a nuisance. It was held that, under the latter part of the above clause, they were required to make a new sewer, if necessary to remove the nuisance, the mode of remedying the evil being left to their discretion by the Act.²

On the other hand, dock companies, acting strictly in accordance with the terms of their statutes, will not be held liable to make compensation, even where such lawful acts prove indirectly injurious to the rights of others.

The London Dock Company were empowered to make a new entrance to their dock, and to take down houses and stoppages. Every person having an estate or interest, not less than a tenancy from year to year, who should be injured in his said estate or interest by the making of any

¹ *Reg. v. Bristol Dock Co.*, 11 Railw. Cas. 542.

² *Rex v. Bristol Dock Co.*, 6 B. & C. 181.

such cut, sluice, bridge, road, or other work, was to be compensated. The company pulled down certain houses and made a cut which intercepted several thoroughfares, and the tenants of a neighbouring public-house demanded compensation for the loss of custom—not for loss of value as a private house. It was held that they were not entitled to such compensation, Lord Denman, C. J., saying, “It is the necessary consequence of the lawful act done by the company.”¹

By a section of a statute empowering commissioners to maintain a sluice, any person who, after the commissioners or any person authorized by them had begun to carry the statute into execution, should sustain any injury thereby, was to be compensated, and the damage or injury was to be ascertained before a jury before the sheriff. The sluice having burst and injured the property of the plaintiff, it was held, that the section only applied to damage resulting from acts authorized by the statute; but, if not, yet as the cause of action was for an omission or non-feasance, it was not within the subject of compensation.²

¹ *Rex v. London Dock Co.*, 5 A. & E. 163.

² *Coe v. Wise*, L. R., 1 Q. B. 711.

CHAPTER VI.

OF FISHERY.

The various Rights of Fishery.

Definition of
right of
fishing.

THE right of fishing is a right which may exist either in connexion with or independent of the ownership of the soil over which water flows. When this right is connected with the ownership of the soil, it is a right of property, one of the profits of the land, and has been called a *territorial fishery*.¹ When it is independent of the ownership of the soil, it is either a common right—like the public right of fishery in the sea and tidal waters—or it is a profit or easement over the soil of another, founded on grant or prescription from the owner of the soil, or from the Crown as owner of the bed of tidal waters.

When unconnected with the ownership of the soil, a right of fishery is an estate of inheritance, which will pass by a grant of all other estates of inheritance,² an incorporeal hereditament, which can only be granted by a deed,³ and which cannot be the subject of an exception in a deed.⁴

It is, moreover, not, strictly speaking, an easement, but it is a *profit à prendre* in the soil of another. As such, it may exist either in *gross*, or as appurtenant to a manor,⁵ and, in some cases, as appurtenant to a house or to land.⁶

¹ See Woolrych on Waters, p. 110; Schultes' Aquatic Rights, p. 87; Angell on Watercourses, p. 80.

² *Cooper v. Phibbs*, L. R., 2 H. L. 150.

³ *Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Bird v. Higginson*, 2 A. & E. 696.

⁴ *Corker v. Payne*, 18 W. R. 436;

Wickham v. Hawker, 7 M. & W. 63.

⁵ *Rogers v. Allen*, 1 Camp. 305; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 702, per Willes, J.; *Wickham v. Hawker*, 7 M. & W. 63.

⁶ *Hayes v. Bridges*, 1 R. L. & S. 390; see *Edgar v. Fishery Commissioners*, 23 L. T., N. S. 737.

A right of fishery in gross is not within the Prescription Act (2 & 3 *Will. IV. c. 71*).¹

A right of fishery would appear not to be a sufficient interest in land to give a claim to compensation under the Lands Clauses Consolidation Act.²

Much difficulty arises, especially in the interpretation of old cases, from the confusion of the terms used to express the various kinds of fishery recognized by the law, from sufficient attention not having been paid to the fact that nearly all the kinds of fishery may exist either in the owner of the soil, or in a stranger,—in which two cases the law, as to trespass particularly, will materially differ.³ It will be the most convenient course here to attempt, in the first place, to define and explain the various kinds of fishery and their incidents, and then to proceed to consider how and where such rights of fishery may be enjoyed. Finally, we shall enumerate and discuss the various statutory regulations of and restrictions on the rights of fishery, with regard to the kinds of fish which may be caught, and the means which may be used to catch them, and the seasons during which they may be caught.

The kinds of fishery mentioned in our books are, according to the best authorities, four in number,⁴—viz. (1) A common fishery; (2) A several fishery; (3) A free fishery; (4) A common of fishery. A fishery *in gross* is also sometimes mentioned; but such a fishery is merely any of the last three kinds when enjoyed apart from the ownership of the soil over which the water flows. We shall make use of the words *territorial fishery* to define that kind of several and exclusive fishery arising from and connected with the ownership of the soil in non-tidal waters.

The various kinds of fishery.

¹ *Shuttleworth v. Le Fleming*, *supra*; *Bland v. Lipscombe*, 4 E. & B. 713.

² *Bird v. Great Eastern Rail. Co.*, 19 C. B., N. S. 268.

³ See Paterson's Fishery Laws, p. 4, and per Fitzgerald, B., in

Bloomfield v. Johnson, Ir. R., 8 C. L. 107.

⁴ See Paterson's Fishery Laws, pp. 4, 45; Woolrych on Waters, p. 75; Houck on Navigable Rivers, p. 138.

Common
fishery.

A common fishery is that kind of right which all the public have to fish in the sea and in tidal navigable rivers, as far as the flux and reflux of the tide. This right cannot, it would seem, exist in non-tidal waters, whether they be navigable or not.¹

Several
fishery.

A several fishery is a right of fishing in a particular place exclusive of all others.² This right may exist, as will be seen hereafter, in tidal waters as a royal franchise to the exclusion of the public,—in which case it is sometimes called a free fishery. It exists *primâ facie* in the owner of the soil of non-tidal waters,—in which case it may be called a territorial fishery. Finally, it may be enjoyed in non-tidal waters by a stranger by grant or prescription to the exclusion of the owner of the soil. The owner of a several fishery, whether owner of the soil or not, can maintain trespass for breaking his several fishery and taking his fish,³ and has a privileged property in the fish before they are caught.⁴

A several fishery or exclusive right to take all the fish at a certain place, when not a territorial right, would appear to be always claimed in gross, or as appurtenant to a manor,⁵ as such a right is too exclusive to be claimed as appurtenant to land.⁶

Free fishery.

A free fishery, also sometimes called a common of fishery, is a fishery in a certain place, not exclusive, but co-extensive with the rights of others.⁷ It may exist in tidal waters, to the exclusion of the public; in which case it resembles a several fishery, except that it is enjoyed by

¹ *Musset v. Burch*, 35 L. T., N. S. 486; *Hargreaves v. Diddams*, L. R., 10 Q. B. 587; *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68; see *post*.

² *Malcolmson v. O'Dea*, 10 H. L. 593, per Willes, J.; *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68; *Holford v. Bailey*, 13 Q. B. 445; *Seymour v. Courtenay*, 5 Burr. 2815; Co. Litt. 122 a; *Hale de Jure Maris*, p. 1; *Gipps v. Woollicot*, Skin. 677; *Smith v. Kemp*, 2 Salk. 637; *Kin-*

nersley v. Orpe, 1 Doug. 56.

³ *Holford v. Bailey*, 13 Q. B. 426.

⁴ *Child v. Greenhill*, Cro. Car. 553.

⁵ *Rogers v. Allen*, 1 Camp. 311.

⁶ *Edgar v. Commissioners of Fisheries*, 23 L. T., N. S. 737.

⁷ *Seymour v. Courtenay*, 5 Burr. 2814; *Malcolmson v. O'Dea*, 10 H. L. 593; *Holford v. Bailey*, 13 Q. B. 445; *Gipps v. Woollicot*, 3 Salk. 291; Co. Litt. 122 a.

two or more persons. It may exist in the owner of the soil of non-tidal waters in conjunction with others, or it may exist in two or more strangers, to the exclusion of the owner of the soil.¹ The main distinction between a several and a free fishery is, that the one is exclusive, and the other is not;² and that, in non-tidal waters, a several fishery implies a right to the soil, while a free fishery does not.³ Formerly also, when different forms of action could not be joined, there was an important distinction between the owners of a several, and of a free fishery; for the owner of a several fishery could maintain an action of trespass for the breaking of his fishery, and taking his fish, whether he was owner of the soil or not; whereas the owner of a free fishery, unless also owner of the soil, could not maintain trespass, but had only a right of action on the case for disturbance.⁴ The owner of a free fishery has not, it appears, such a property in the fish before they are caught, as to enable him to maintain trespass for taking fish, such fish not being the property till they are caught.⁵ A free fishery may be claimed in gross or as appurtenant to land.⁶

The term "free fishery," however, is frequently used to express a several fishery in a public river; and much confusion has arisen from the ambiguous use of the term. Willes, J., remarks in a late case, already cited,⁷ "Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to

¹ See Paterson's Fishery Laws, p. 53.

² In *Bloomfield v. Johnson* it was held, that the grant of a free fishery, especially by the Crown, is the grant of a fishery not exclusive, and evidence cannot be received to show that it was intended to exclude the grantee.

³ *Holford v. Bailey*, 13 Q. B. 426; *Marshall v. Ulleswater*, 3 B. & S. 732; see also *Bloomfield v. Johnson*, Ir. R., 8 C. L. 105.

⁴ *Bloomfield v. Johnson*, per Fitzgerald, B., Ir. R., 8 C. L. 68; *Holford v. Bailey*, 13 Q. B. 426; *Gipps v. Woollicot*, Skin. 677, per Holt, C. J.; *Upton v. Dawkins*, 3 Mod. 97.

⁵ *Bloomfield v. Johnson*, *supra*.

⁶ See per Willes, J., in *Edgar v. Commissioners of Fisheries*, 23 L. T., N. S. 737; *Rogers v. Allen*, 1 Camp. 311; *Hayes v. Bridges*, 1 R. L. & S. 390.

⁷ *Malcolmson v. O'Dea*, 10 H. L. 593.

“ have been called in the pleadings, following Blackstone, “ a ‘ free,’ instead of a ‘ several ’ fishery. This is more of “ the confusion which the ambiguous use of the word “ ‘ free ’ has occasioned, from as early as the *Year Book*, 7 “ *Hen. VII.*, 13, down to the case of *Holford v. Bailey* “ (13 Q. B. 444), where it was clearly shown that the “ only substantial distinction is between an exclusive right “ of fishery, usually called ‘ several,’ sometimes ‘ free ’ “ (used as in free warren), and a right in common with “ others, usually called ‘ common of fishery,’ sometimes “ ‘ free ’ (used as in free port). The fishery in this case is “ sufficiently described as a several fishery, which means “ an exclusive right to fish in a given place, either with or “ without the property in the soil.”

Effect of
grant of a
fishery.

Where the owner of a several fishery grants a free fishery, the grantee takes a free fishery; but where he grants his fishery without specifying what kind of fishery, the whole fishery will pass.¹

An exclusive fishery, it seems, may be divided, without losing its proper character; for where a grantor granted a several fishery, with the exception of an oystery, and reserving to himself to take fish for the supply of his own table, it was held that this was the grant of a several fishery; for, said the Court, “ In order to constitute a “ several fishery, it is requisite that the party claiming it “ should have the right of fishing, independent of all “ others, as that no person should have a co-extensive “ right with him in the subject claimed; for where a “ person has a co-extensive right, there is only a free “ fishery. But we think that a partial independent right “ in another, or a limited liberty, does not derogate from “ the right of the several owner.”²

Common of
fishery.

A common of fishery appears to be much the same as a free fishery—*i. e.*, a right not exclusive to fish in a par-

¹ *Alderman of London v. Hastings*, 2 Sid. 8.

² *Seymour v. Courtenay*, 5 Burr. 2815; see also *Holford v. Pritchard*,

3 Ex. 793; *Bird v. Higgenson*, 2 A. & E. 696, as to the right of letting part of a fishery; see also 1 Mod. 106.

ticular place, and is often used in this sense, but it is generally used to express the right acquired by tenants of a manor to fish in the waters of the lord. This right is on the same footing as other commons, and depends much in each case on the custom of the manor. It is generally appendant or appurtenant to the copyhold tenements of the manor, but in some cases is held in gross.¹

“A common of fishery,” says Paterson,² “is of three kinds—common appendant, common appurtenant, and common in gross. A common appendant is a right inseparably annexed to the possession of a particular house, and the extent of the right is measured by the reasonable requirements of the family. It is a right of a permanent nature attached to a house, and is not available to mere inhabitants or lodgers, but is restricted to him who has an estate or interest in the house.³ Hence it is that the inhabitants of a vill or city cannot prescribe for such a right, as there would be an uncertain measure of claimants.⁴ A common of piscary appurtenant is a right claimed by a person in respect of a house not necessarily connected by way of tenure or otherwise with the liability of the fishery, the right must have been granted by deed within the time of legal memory.⁵ It may also be severed from the house and land to which it is appurtenant.⁶ Common in gross is a right claimed by a person not in respect of any land, but under a grant, or, what is equivalent, by prescriptive user.”

A right of fishery apart from the ownership of the soil, being an incorporeal hereditament, can only be conveyed by deed.⁷ A licence to fish is distinct from a right of

Licences
to fish.

¹ Paterson's Fishery Laws, p. 55; Woolrych, p. 127; 4 Edw. IV. 29.

² Fishery Laws, p. 56.

³ *Gateward's case*, 2 Rep. 59 a.

⁴ *Orderway v. Orme*, 1 Bulst. 183;

Tinney v. Fisher, 2 Bulst. 87;

English v. Burnell, 2 Wils. 258.

⁵ *Cowlam v. Slack*, 15 East, 107;

Pretty v. Butler, 2 Sid. 87.

⁶ *Teniel v. Harslop*, 3 Keb. 66;

Hayes v. Bridges, 1 R., L. & S. 890.

⁷ *Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Bird v. Higgenson*, 2 A. & E. 696.

fishery, and is revocable at will. A licence (*in order to be binding on the grantor*), even for an hour, must be granted by deed.¹ But the fishery may be let by verbal agreement, and even where no rent has been agreed upon, the landlord is entitled to sue the tenant for a reasonable rent for use and occupation.²

Having now defined the various kinds of fishery recognized by the law, we now propose to consider how and where such rights can be enjoyed.

Fishery in the Sea.

Fishery in the high seas is common to all the world.

On the high seas the right of fishing is common to all the world without any restriction or limitation whatever, either as to the description of fish that may be caught, or the means of catching them. When, however, disputes of a private character arise on the open sea between fishermen of different countries, the solution of these disputes is regulated by the custom of the locality where they occur. But such custom to be binding must be clearly understood by all those who frequent the locality in question.³

Fishery in the territorial waters of the realm.

The rights of fishery in the territorial waters of the realm within the distance of three nautical miles of low water mark would appear to be vested exclusively in the subjects of the realm by international law, evidenced by treaty or immemorial user, the subjects of one country not being entitled to fish within the territorial sea of another without a licence from the Crown or sovereign authority.⁴ Within the ports and harbours and in the sea within the body of a county, or *intra fauces terræ*, and between high

¹ *Holford v. Bailey*, 13 Q. B. 426, per Parke, B.; *Hopkins v. Robinson*, 2 Lev. 2.

² *Holford v. Pritchard*, 3 Ex. 793.

³ *Aberdeen Arctic Co. v. Sutter*, 4 Macq. App. Cas. 355; *Fenning v. Lord Grenville*, 1 Taunt. 147; see also Paterson's Fishery Laws, pp. 6, 7, and cases cited there; *Little-*

dale v. Smith, 1 Taunt. 243 a; *Hogarth v. Jackson*, M. & M. 58; *Skinner v. Chapman*, M. & M. 59, n.

⁴ See Paterson's Fishery Laws, p. 6; Hale de Jure Maris, c. 4; Selden, Mare Clausum, bk. 11, c. 81; see also *Reg. v. Keyn*, 2 Ex. Div. 205.

and low water mark, the fishery is, by common law, common to all the subjects of the realm, subject to legal restrictions mentioned hereafter.

By a convention entered into with the French government, which is embodied in the *Sea Fisheries Act*, 1868,¹ it is provided that British fishermen shall enjoy the exclusive right of fishery within three nautical miles from low water mark of the British coast, and that French fishermen shall enjoy the same privilege within three nautical miles of the French coast, except as to that portion of the French coast between Cape Carteret and Point Meinga. The distance of three miles with respect to bays, the mouths of which do not exceed ten miles in width, is to be measured from a straight line drawn from headland to headland. Various regulations and restrictions on the manner of taking, and the seasons for taking fish, are imposed, which will be considered in a later part of the chapter.

Convention
with France.

A convention also exists with the United States as to the fisheries on the coast of North America, embodied in the statute 18 & 19 *Vict. c. 3*.

With
America.

The right of fishing in the sea being common to all subjects of the realm, a prescription for such a right annexed to a tenement is bad.²

Fishery in Tidal Waters.

The right of fishing in the sea between high and low water mark, in tidal waters, in estuaries and arms of the sea, and in public navigable rivers, so far as the tide ebbs and flows, is *prima facie* vested in all the subjects of the realm.³ It seems somewhat doubtful whether this right is

The public
right.

¹ 31 & 32 *Vict. c. 45*.

² *Ward v. Cresswell*, Willes, 265.

³ *Malcolmson v. O'Dea*, 10 H. L. 593; *Murphy v. Ryan*, Ir. R., 2 C. L. 143; *Bristowe v. Cormican*, 3

App. 641, per Lord Blackburn; *Crichton v. Colley*, 19 W. R. 107; *Reg. v. Stimson*, 4 B. & S. 301; *Carter v. Murcott*, 4 Burr. 2163; *Fitzwalter's case*, 1 Mod. 106; Hale *de Jure Maris*, p. 1, c. 4.

to be considered as belonging to the public of common right, or whether they derive it from the Crown as owner of the bed and soil of tidal waters;¹ but, however acquired, this right is now absolute and cannot be barred or interfered with by grant or charter from the Crown.² This public right includes the right of fishing on the shore between high and low water mark, and of taking shell-fish there, though it appears doubtful whether the public have a right to take fish shells.³ This right of using the shore, however, does not extend to the right of using the adjoining land for the purposes of fishery, either in the way of fixing nets by stakes, or drying nets, or drawing them ashore; as such rights would be inconsistent with the nature of permanent private property,³ such rights may, however, it seems, be gained by custom by the fishermen of a particular locality.⁴

Interference
with, indict-
able;

It would appear that, by common law, the public have the right of catching in the sea and public rivers all the fish they can by all means which are not inconsistent with the rights of others, but that any undue interference with the rights of others is a nuisance and indictable.⁵ The right of public fishery, however, includes the right to use lawful nets.⁶

and actionable
on proof of
special
damage.

It has been held by the Irish Court of Exchequer, that an infringement of the public right of fishery is actionable on proof of special damage, and that a member of the public who was licensed to fish in the upper waters of a tidal river could maintain an action against a person who by unlawfully fishing in the lower waters of the river,

¹ As to this, see Woolrych on Waters, p. 76; and *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361.

² *Warren v. Mathews*, 6 Mod. 73.

³ *Blundell v. Catteral*, 5 B. & A. 299, per Holroyd, J.

⁴ Year Book, 13 Hen. VIII. 15, 6; 8 Edw. IV. 19, pl. 30; Hale de Port. Maris, p. 86; Year Book, 15

Edw. IV. f. 29 A, pl. 7; *Padwick v. Knight*, 7 Ex. 861; *Blundell v. Catteral*, 5 B. & Ald. 291.

⁵ As to this, see Paterson, p. 33; judgment of fishery commissioners in *Leconfield v. Lonsdale*, L. R., 5 C. P. 664; *Hamilton v. Donegal*, 3 Ridg. P. C. 267.

⁶ *Warren v. Mathews*, 6 Mod. 73.

within certain limits prohibited by statute, caused damage to the plaintiff in the exercise of his right to fish.¹

The public have no right to take royal fish,—*i.e.* whale, sturgeon, or porpoise, which, whether caught in the sea or thrown on the shore within the realm, are the property of the Crown and not of the finder.²

Royal fish.

The public common fishery is, it would appear, confined to the sea and tidal waters, and cannot exist at law in non-tidal waters, although navigable and navigated from time immemorial, for the purposes of commerce, the right to navigate giving no right to fish. This point has been expressly decided by the Irish Courts in two modern cases; and though it has never come directly before the English Courts, it would seem, from opinions expressed by learned judges, as well as from principle, that the same rule of law would prevail in this country if occasion necessitated its decision.

Public right confined to tidal waters.

It has been held by the Court of Queen's Bench, that where a non-tidal river was made navigable by an Act of Parliament which did not expressly interfere with the rights of the riparian owners, none of the incidents attaching to a navigable river up to the flow and re-flow of the tide can properly attach, and that, therefore, a claim on the part of the public to fish there is a claim to a right which cannot exist at law.³

Following this, the Court of Exchequer has held, that such a right cannot exist at law in a non-tidal river which had been made navigable by locks, although evidence was given of user by the public of the right of fishing for more than forty years.⁴

From these cases it is clear that where a non-navigable river has been made navigable by artificial means, the public right of fishery cannot exist.

¹ *Whelan v. Hewson*, Ir. R., 6 C. L. 283.

³ *Hargreaves v. Diddams*, L. R., 10 Q. B. 582.

² See Hall on the Seashore, p. 80; Paterson's Fishery Laws, pp. 24, 265, and *ante*, Chap. I. p. 40.

⁴ *Musset v. Burch*, 35 L. T., N.S. 486.

The question, however, as to the right of the public to fish in non-tidal waters which have been navigable, and navigated from time immemorial, is one on which much difference of opinion prevailed, which has, as has been said, never been expressly decided by the English Courts. In the Irish Court of Common Pleas,¹ this question arose as to the right of fishing in the river Barrow, which was proved to be in the place in question, a non-tidal navigable river which had been navigated from time immemorial, and in which there had been an immemorial usage of fishing by the public. The Court held, that as the right of the public to fish in the sea and its arms and estuaries, and in tidal waters, depends on the ownership of the soil by the sovereign as trustee for the public; such a right could not be claimed by the public in non-tidal waters where the soil belongs *primâ facie* to the riparian owners *usque ad medium filum aque*, and not to the Crown; and that, moreover, such a right could not be established by immemorial user being a claim to a *profit à prendre* in the soil of another, which might involve the destruction of his property.² "Upon full consideration of the cases," says O'Hagan, J., "it will, I think, appear, that no river "has been ever held navigable, so as to vest in the Crown "its bed and soil, and in the public the right of fishing, "merely because it has been used as a general highway "for the purpose of navigation; and that beyond the "point to which the sea ebbs and flows even in a river so "used for public purposes, the soil is *primâ facie* in the "riparian owner, and the right of fishing private."

In the case of *Bloomfield v. Johnson*,³ the Irish Court of Exchequer Chamber affirmed, with some hesitation, a judgment of the Court of Common Pleas, which determined that there is no public right of fishery in large inland non-tidal navigable lakes. The same point was

¹ *Murphy v. Ryan*, Ir. R., 2 C. L. 143.

² See *Hudson v. McRae*, 4 B. & S. 585; *Race v. Ward*, 4 E. & B.

713; *Bland v. Lipscombe*, 4 E. & B. 713, note (c).

³ Ir. R., 8 C. L. 68.

raised on demurrer in a subsequent Irish case,¹ and the Court of Exchequer held themselves bound by the prior decision of the Exchequer Chamber in *Bloomfield v. Johnson*. No appeal was brought from this judgment on the demurrer; but on appeal to the Exchequer Chamber for a new trial on the ground of misdirection or other grounds, Whiteside, C. J., strongly expressed his dissent from the principle affirmed in the judgment of the Court of Common Pleas on the demurrer.² The case subsequently went to the House of Lords, but the point as to the right of the public to fish not being before the House, no decision was given on it, but their lordships held unanimously, that the Crown has no *primâ facie* right to the soil or fishery of non-tidal waters, though they were doubtful whether the rule, that the riparian owners on non-tidal waters are *primâ facie* entitled to the soil *ad medium filum aquæ*, applied to large inland lakes.³ In the case of *Mayor of Carlisle v. Graham*, the English Court of Exchequer held, following *Murphy v. Ryan*, that as the public right of fishing in public navigable rivers arose from the ownership of the Crown of the bed of such rivers, where a public navigable river changed its bed and flowed over a channel in the soil of a subject, the public right of fishing was lost.⁴ In *Orr Ewing v. Colquhoun*, it is expressly decided, that the right of navigation on non-tidal waters confers no right of property on the public navigating.⁵

If, therefore, it be law that the public right of fishing is a right arising from the ownership by the Crown of the bed over which the water flows, it seems to follow from necessity, that in rivers above the flux and reflux of the tide, in which the ownership of the soil is undoubtedly in the riparian owners, and in large navigable non-tidal lakes where it is undoubtedly not in the Crown, such a right cannot exist. It being, however, undecided to whom the

¹ *Bristowe v. Cormican*, Ir. R., 10 C. L. 398.

² Ir. R., 10 C. L. 434.

³ 3 App. C. 641.

⁴ L. R., 4 Ex. 361.

⁵ 2 App. C. 839.

bed of such lakes belongs, another element of difficulty enters into the subject with regard to them. In the case of *Reg. v. Burrow*,¹ which was an appeal from a conviction by justices of a defendant who set up a *bonâ fide* claim of right as one of the public to fish in Ulleswater, Cockburn, C. J., seems rather to doubt the principles of law as stated in *Murphy v. Ryan*. "If," he says, "it had been clearly settled that the public " could not have any right to fish in a navigable river " above the flow of the tide, it might be different; but I, " for one, am not prepared to assent to that proposition " without further argument; and though there is recent " authority for the proposition, that cases may be taken " by appeal to a higher Court; and in my opinion, it is a " point of so much importance, that it should be taken, if " necessary, to the very highest Court in the realm; such " being the state of the question involved, and seeing " that the defendant gave the very highest proof of *bona* " *fides*, I think the justices ought to have held their " hands; and I must say, it is the strongest instance of " such a course being necessary that I have met with in " my experience."

Several
fishery in
tidal waters.

Although *primâ facie* every subject is entitled to fish in the sea and tidal waters, yet prior to Magna Charta, the Crown could by its prerogative exclude the public from such *primâ facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. The Great Charter restrained this exercise of prerogative for the future, but left untouched all fisheries which were made several to the exclusion of the public by act of the Crown not later than reign of Henry II.² Where, therefore, an individual claims a several fishery in the sea or tidal waters, he must prove his

How claimed.

¹ 34 Justice of Peace, p. 53.

² *Malcolmson v. O'Dea*, 10 H. L. 593; *Crichton v. Colly*, 19 W. R. 107; *Carter v. Murcott*, 4 Burr.

2163; *Fitzwalter's case*, 1 Mod. 106; see also *Duke of Northumberland v. Houghton*, L. R., 5 Ex. 127.

right to it, either by express grant from the Crown prior to Magna Charta, or by prescription from which such right will be presumed. In all cases the presumption is against the claimant, and he must establish affirmatively his exclusive right.¹

Where he can prove an express grant or charter from the Crown, his right is without question.² Where the claim is by prescription, the effect of the evidence in such cases is thus explained by Willes, J. “If evidence be given
“of long enjoyment of a fishery, to the exclusion of others,
“of such a character as to establish that it has been dealt
“with as of right as a distinct and separate property, and
“that there is nothing to show that its origin was modern,
“the result is, not that you say, this is usurpation, for it is
“not traced back to Henry II., but that you presume that
“the fishery, being reasonably shown to have been dealt
“with as property, must have become such in due course
“of law, and, therefore, must have been created before
“legal memory.”³ In the case cited, the plaintiff brought an action for breaking and entering his several fishery on the Shannon; and defendant set up as a defence that the river was a navigable river, and that the public had a right to fish there. The plaintiff put in evidence a patent of Queen Elizabeth, purporting to grant the several fishery in question, and defendant contended that the sovereign had no power by patent or otherwise to create a several fishery in a navigable river. It was held by the Irish Exchequer Chamber, that the grant by Elizabeth, and the user under it, was no evidence of a grant before Magna Charta, but the House of Lords reversed the judgment, and held that the fact of the Crown dealing with such a right in the days of Elizabeth was *prima facie* evidence that the right had a legal origin, *i. e.*, had been exercised

By grant.

By prescription.

¹ *Crichton v. Colley*, 19 W. R. 107; *Carter v. Murcott*, 4 Burr. 2163, per Lord Mansfield; *Reg. v. Stimson*, 4 B. & S. 301; *Hale de Jure Maris*, p. 1, c. 4.

² *Hale de Jure Maris*, p. 1, c. 5.

³ *Malcolmson v. O'Dea*, 10 H. L. 618; see also *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

before Magna Charta, and, that being the case, the several fishery could lawfully be afterwards made the subject of a grant by the Crown to a private individual.¹

But though the long exclusive enjoyment of a several fishery in a public navigable river is sufficient *primâ facie* evidence to presume that the Crown had granted a separate right before Magna Charta, yet any reasonable ground for considering that the user had not been exclusive, may be sufficient to negative such right. This point arose in a modern case,² on a case stated by the special commissioner of fisheries for the opinion of the Court of Common Pleas. The appellants claimed a right to a several fishery by means of a raise net on a marsh in the estuary of the tidal river Eden, and gave proof of user of it since 1797, though the right was contested by people in the neighbourhood. The fishery was claimed as part of the manor of Leonard Dacre, who was attainted in the reign of Elizabeth, on his attainder an inventory of his things were taken, and no mention was made of this particular net claimed; and the Court held that the omission of all mention of the right to a fishery of so peculiar a kind, as to be accompanied by the right to use a fixed engine, was almost conclusive proof that the right did not exist at that time, and that, therefore, the presumption of a grant before Magna Charta was negatived. Willes, J., says at p. 736 of the Report, "I entirely adhere to what was said by the judges in the "*Shannon case (Malcolmson v. O'Dea*, 10 H. L. 593), that "long exclusive enjoyment of a right to a fishery in a "public navigable river, is sufficient evidence, and evidence "upon which, in the absence of any evidence to the contrary, it would be right to arrive at the conclusion that "the Crown had granted a separate and exclusive right to "the person under whom the claim is made, as early as "the reign of Hen. II., which is the latest reign in which

¹ *Malcolmson v. O'Dea*, 10 H. L. 593; *Duke of Devonshire v. Hodnett*, 1 Huds. & Br. 332.

² *Edgar v. Commissioners of Fisheries*, 23 L. T., N. S. 732.

“ any such grant could be effected. You refer that long
“ and peaceable enjoyment to a legal origin, assuming
“ that there was a continuance of such enjoyment from the
“ time when such legal origin could have existed and
“ come into existence, or given existence to a right. But
“ in dealing with a case of that description, you cannot
“ apply the same rules that you would to a case of a right
“ which might be created by a subject since the time of
“ legal memory, because you must shut out the presump-
“ tion of a lost grant to the subject since the time of legal
“ memory. It will not do to prove thirty years’ enjoy-
“ ment of such a right, commencing at the beginning of
“ the thirty years, or commencing at the beginning of
“ any other epoch later than the end of the reign of
“ Hen. II.; and for this reason, because as soon as you
“ show that the origin was later than the time of Henry
“ II., you negative the inference of a usage from that
“ period, which inference is the foundation of the conclu-
“ sion, that there was a grant as early as the reign of
“ Henry II.”

In the case of *Holford v. George*,¹ where the owner of a several fishery in a navigable tidal river claimed a right to use certain engines which were made illegal by *The Salmon Fishery Act*, 1861, unless they had existed before Magna Charta; it was held that a user of them for forty-five years did not raise a conclusive presumption that they had been so used before Magna Charta, and that the fishery commissioners were not bound by a conclusive presumption of law to say that because there was no evidence to negative an origin before the time of legal memory, the right must have existed before that period. With respect to other engines, of which a user of twenty years only was proved, the Court held that the commissioners in that case would not have been justified in assigning to them an origin before Magna Charta. In

¹ L. R., 3 Q. B. 639.

a similar case,¹ the Court of Common Pleas held that if during all living memory the enjoyment of the right claimed had been uniform and unvarying, and consistent also with the ancient documents of title, that the commissioners would have been bound to refer it to a legal origin,—as by grant, charter, or immemorial usage, if possible.

As appurtenant to manors or lands.

It has been said that rights of fishery may be claimed both in gross—*i. e.* by special grant or prescription—or as appurtenant to a manor or to land. It would seem doubtful whether this will apply to a several fishery in a public navigable river. It was held at nisi prius by Heath, J.,² that a several fishery may be appurtenant to a manor; and this is approved by Willes, J., in *Shuttleworth v. Le Fleming*.³ In the Irish case of *Hayes v. Bridges*,⁴ the Court held that an exclusive right of fishery might be prescribed for as appurtenant to land. In the case of *Edgar v. The Special Commissioners of Fisheries*,⁵ this question is discussed in an elaborate judgment by the late Mr. Justice Willes, who seems to doubt whether such an extensive right as a right to take all the fish in a public navigable river could be claimed as appurtenant to land. “You may have,” he says, “a fishery appurtenant to land—and one has seen pleadings in which this sort of thing was claimed—that he and all he has in the said house have fished as appurtenant to the land; but when you come to prove the right, can you show under such a claim as that, an exclusive right to take all the fish in a particular place? Can you show an exclusive right to take all the fish in a navigable tidal river? It has been

¹ *Rawstorne v. Backhouse*, L. R., 3 C. P. 67; see *Reg. v. Downing*, 11 C. C. C. 580, where evidence that the prosecutor and his father had for forty-five years exercised the sole and exclusive right of oyster fishing, and that a verdict had been given in 1846 for the prosecutor in an action to try his

right, was held sufficient to support an indictment for stealing oysters from the bed.

² *Rogers v. Allen*, 1 Camp. 305; see also *Reg. v. Stimson*, 4 B. & S. 301.

³ 19 C. B., N. S. 702.

⁴ 1 R., L. & S. 390.

⁵ 23 L. T., N. S. 737.

“decided over and over again that a right of that kind
 “must be in some way connected with the enjoyment of
 “the house. No doubt they might have the use of the
 “fishery for the house; or even for their pleasure it might
 “be connected with the enjoyment of the house. But
 “a right to a fishery for the purpose of catching all the
 “fish and excluding others for purposes of trade—that is,
 “putting them in boxes and sending them off in ice—
 “does not appear to be at first sight connected with the
 “enjoyment of the house, and particularly not with the
 “enjoyment of lands and ancient tenements as apart from
 “the enjoyment of the house. It may be annexed to
 “land, but you must have it for the use of the house by
 “those who hold the land. Therefore it would be well to
 “consider, if that question is worth anybody’s while to
 “raise, whether you can have an exclusive right to take
 “all fish in a navigable river simply as appurtenant to
 “land.”

The right to a several fishery in tidal waters is, as has
 been said, a franchise originally granted by the Crown.
 A well-known distinction exists between such franchises
 as upon forfeiture may exist in the Crown, and therefore
 be capable of re-grant, and such others as cannot exist
 in the Crown, but only in a grantee from the Crown,
 and therefore become actually extinct upon forfeiture.¹
 In the case of *The Duke of Northumberland v. Hough-*
ton,² the plaintiff claimed a several fishery in the Tyne,
 which he proved to have existed from time immemorial,
 and therefore to have a legal origin, having been origi-
 nally granted before Magna Charta to the prior and
 monks of a monastery. The defendants proved that after
 Magna Charta the original grantees had forfeited their
 liberties and free usages, and contended that under these
 words a several fishery was included, and that the fishery,
 having been forfeited, had merged, and could not be re-

Several
 fishery a
 franchise.

¹ See Paterson’s Fishery Laws, p. 18.

² L. R., 5 Ex. 127.

granted by the Crown. The Court held that plaintiff was entitled to judgment,—Martin, B., being of opinion that a several fishery is one of those franchises which does not merge upon being resumed by the Crown, either by forfeiture or otherwise,—Kelly, C. B., and Pigott, B., apparently being of the same opinion, but holding that as the words liberties and free usages did not include a several fishery, the question of merger did not arise.¹

Effect of
grant.

The right of an exclusive fishery in the sea and tidal waters, being a royal franchise, is not a territorial right, and is capable of being held by a subject either with or without the ownership of the soil. Thus on the sea shore, where the Crown is owner *primâ facie* of the soil between high and low water mark, and in public navigable rivers, where it is owner *primâ facie* of the whole bed up to high water mark, a grant might have been made before Magna Charta by the Crown to a subject, either of the soil and the fishery together, or of the soil alone, or of the fishery alone,—the two rights being separable. In general it will be a question of construction of the ancient grants under which the claim is made, explained by user subsequent to their date, what is the measure of right.² It would appear, therefore, that though as a fact an exclusive fishery in tidal waters is generally coupled with the exclusive ownership of the soil, there is no presumption that they are united as in the case of private streams.

In the case of *The Duke of Somerset v. Fogwell*,³ a grant by the Crown of lands, and all waters, fisheries, &c. to the aforesaid manors, castles, and premises belonging and appendant, was held to pass a several fishery in a tidal navigable river as an incorporeal hereditament only, and not to pass the soil. Bayley, J., remarking—"Considering

¹ As to this point, see also Paterson's Fishery Laws, p. 18, in case of *Abbot of Strata Marcella*, 9 Rep. 24 a; *Heddy v. Wheelhouse*, Cro. Eliz. 591; *R. v. Mayor of London*,

1 Shaw, 230.

² Paterson, p. 20; see *Duke of Beaufort v. Swansea*, 3 Ex. 413.

³ 5 B. & C. 884; as to private streams, see *post*.

“the nature of the franchise and the law as to rights of fishery in other rivers, I have no difficulty in saying that in my judgment this was not a territorial but an incorporeal franchise.”

A grant of sea-grounds, oyster layings, shores, and fisheries has been held to pass the soil also,¹ as has a grant of all those fishings of the halves and halvendoles, with the appurtenants to the halves due and accustomed within the river Severn within a manor, and of all royal fishes, under an annual rent.² The words used in these two cases quite admit of the larger construction. Lord Ellenborough, in the latter case, saying, “I think it appears distinctly that these halves and halvendoles are of the nature of land. I cannot consider it otherwise than the grant of something territorial.”

It has been held in two late cases that the right of the Crown before Magna Charta to grant a several fishery in public rivers is derived from its ownership of the soil of the bed, and that, therefore, a several fishery granted by the Crown in a public navigable river, which afterwards changed its course and flowed over the land of an adjacent proprietor, could not be followed to the new channel, on the ground that the new channel was not the property of the Crown.³

From this it would appear that no grant by the Crown of a several fishery in the sea below low water mark would be valid, the soil not being in the Crown, but without the realm.⁴

A free fishery—*i. e.*, a right of fishing not exclusive—Free fishery. may also exist in tidal waters and public rivers. The modes of origin and incidents to this right will not differ materially from those of a several fishery—the main distinction being that it is a co-extensive right enjoyed by

¹ *Scrutton v. Brown*, 4 B. & C. 485.

² *R. v. Ellis*, 1 M. & S. 652; see also *Gray v. Bond*, 5 Moore, 527; *Hale de Jure Maris*, 1 Harg. 34.

³ *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361; *Murphy v. Ryan*, Ir. R., 2 C. L. 143.

⁴ See *Reg. v. Keyn*, 2 Ex. Div. 63, *ante*, p. 5.

User of
fisheries.

two or more persons instead of an exclusive right enjoyed by one alone.¹

The owner of a fishery has not of necessity a right to land on the shore without the assent of the owners of the freehold.² In cases of grants to individuals it is often a question of construction whether the right to use the banks for the purpose of the fishery is impliedly granted, and this appears to depend on whether it is necessary to the exercise of the fishery that such banks should be used.³ The open enjoyment of a right of landing and drawing nets, and of occasionally sloping and levelling the shore for twenty years, has been held sufficient to warrant a judge in directing a jury to presume a grant of such right.⁴

The right of fishery in the sea and navigable rivers is subordinate to the right of navigation, and cannot be used in any way so as to derogate from or interfere with such right.⁵ A grantee of the Crown takes subject to this right, and cannot, in respect of the ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with enjoyment of this public right.

Thus a claim to take toll from all vessels anchoring within the limits of an oyster fishery cannot exist merely in respect of the use of the soil.⁶

Where both the rights of navigation and of fishery are incompatible, the fishermen must give way to the navigation of vessels,⁷ but the navigator must do the least possible injury to the fisherman, for he is in the exercise of a lawful right. Thus, where oysters were placed in a public

¹ See *ante*, p. 338.

² *Woolrych on Waters*, p. 167; *Ipswich v. Browne*, Savil. 2.

³ *Paterson's Fishery Laws*, p. 30. See *R. v. Ellis*, 1 M. & S. 666; Co. Litt. 59 b; *Lifford's case*, 11 Rep. 52; 1 Wms. Saund. 323, n. 6; *Shep. Touch.* 89; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 683.

⁴ *Gray v. Bond*, 2 B. & B. 667.

⁵ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 285; *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁶ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

⁷ *Anon.*, 1 Camp. 516, n.; see *Paterson*, p. 32.

navigable river, so as to be a nuisance to the navigation, it was held that the liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float, and consequently it is no excess of the right if a vessel, which cannot reach her destination in a single tide, grounds on the oyster bed till the tide serves, but that a person navigating is not justified in damaging such property by running his vessel against it if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public, and therefore the fact that such property is a nuisance is no excuse for running against it negligently.¹ The nature of the right was not affected, even though the vessel grounding might be liable to compensation for the injury done.²

All weirs appurtenant to fisheries, and all other fixed engines for taking fish which obstruct the whole or part of the navigation of a public navigable river, are illegal, and a nuisance unless granted by the Crown before the reign of Edward I.³

Weirs, &c.
obstructing
navigation.

The right to maintain a weir in a public navigable river came into question in the year 1839 as to the river Severn.⁴ The weir in question was proved to have existed since the time of the Domesday Book, and the question was whether the Crown had the right before Magna Charta to authorize the erection of weirs interfering with the public right of navigation. The Court held, that the common law right was and always had been paramount to the power of the Crown to interfere by grant, but that the statute of 25 *Edw. III. c. 4*, which directed the destruction of all gorges,⁵ mills, weirs, stanks, stakes, and kiddles⁶ which had been

¹ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

² *Ib.* 373, and per Coltman, J., at p. 355; see also *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; see also *Dimes v. Petley*, 15 Q. B. 329.

³ 25 *Edw. III. stat. 4, c. 4*; 45

Edw. III. c. 2; 1 Hen. IV. c. 12; 12 *Edw. IV. c. 7, s. 3*.

⁴ *Williams v. Wilcox*, 8 A. & E. 314.

⁵ A deep pit of water or gulf; Co. Litt. 5 (a).

⁶ Open weirs, whereby fish are caught; 2 Inst. 38.

set up in the time of Edward I. and subsequently, legalized by implication all those erected before that time, though in strictness they were illegal at common law. It, therefore, follows that if a weir obstructing the navigation can be shown to have existed before the time of Edward I., it must be held to be legal.¹

Weirs obstructing fishery in public rivers.

The question whether weirs and fixed engines for taking fish in public navigable rivers, but which do not interfere with the navigation, are illegal and a nuisance, is not quite so clear. So far as salmon are concerned, the question is practically provided for by the Salmon Fishery Acts;² but as regards other fish, and where the Salmon Acts do not apply, the question is still of some importance. It would appear, as has been before stated, that the public have a right in the sea and navigable rivers to catch all the fish they can by all means which are not inconsistent with the rights of others.³ This authorizes them to use lawful nets,⁴ but could not authorize the erection of weirs or the fixing to the soil of fixed engines, which would be a *purpresture* on the soil of the Crown. Further, no prescriptive right could be acquired to such erections, it having been held that the fishing in the sea being common, a prescription for such a right is void.⁵ Moreover, though the early statutes from *Magna Charta* to 1 *Hen. IV.*, which order the destruction of all weirs throughout the kingdom with the exception of those existing prior to the reign of Edward I., and forbid the erection of new weirs, and the enhancement or enlarging of ancient ones, have been held⁶ to refer to navigable rivers only, and to the obstruction of the navigation, as the sole ground for putting them down; yet it appears to be the opinion of the Court of Queen's Bench, that the later

¹ As to what evidence is necessary to prove the existence of this immemorial right, see *Holford v. George*, L. R., 3 Q. B. 639; *Rawstorne v. Backhouse*, L. R., 3 C. P. 67, and *ante*, p. 348 *et seq.*

² See *post*, p. 386 *et seq.*

³ *Ante*, p. 344.

⁴ *Warren v. Mathews*, 6 Mod. 73.

⁵ *Ward v. Cresswell*, Willes, 265; *Bevins v. Bird*, 12 L. T., N. S. 306.

⁶ *Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657.

statutes 4 *Hen. IV. c. 11*, 2 *Hen. VI. c. 19*, and 12 *Edw. IV. c. 7*, which recite the earlier statutes, and expressly refer to the protection of the young fry of fish as one of the objects for enforcing them, make such weirs and fixed engines as facilitate the destruction of young fish, illegal and a nuisance.¹

With regard to the right of the owner of a several fishery in a public navigable river to maintain a weir, inasmuch as the right to the several fishery itself must be traced to an origin before Magna Charta, his right to maintain a weir as appurtenant thereto would require an equally ancient title to make it legal, otherwise it is a public nuisance.

Where a right to an ancient weir has been established, the weir must not be enhanced, straitened, or enlarged, as will be a public nuisance.

In addition to a liability for indictment for a public nuisance, the owner of a fishery who interferes in an unauthorized manner with the passage of fish up a river, will be liable to an action for damages at the suit of another owner prejudiced thereby.² Thus where the defendant, who was the owner of an ancient weir made of brushwood, through which salmon could pass, converted the same into a solid stone weir impervious to fish, it was held that the plaintiff, the owner of a fishery above him, could recover damages for the injury to his fishery.³ In the case of *Marquis of Donegal v. Hamilton*,⁴ where the owner of a lower fishery on the Bann made weirs, cuts and traps, by means of which the current of the stream was altered, and so the passage of trout, salmon, and other fish was prevented, it was held that the plaintiff, an upper proprietor on the river, had a right of action. Fitz Gibbon,

Obstructions
to fishery
actionable.

¹ *Rolle v. Whyte*, per Cockburn, C. J., L. R., 3 Q. B. 301; *Holford v. George*, L. R., 3 Q. B. 639.

² *Weld v. Hornby*, 7 East, 195, per Lord Ellenborough, C. J.; *Leconfield v. Lonsdale*, L. R., 5 C. P. 726, per Bovill, C. J.; Lib. assiz.

246; see also per O'Hagan, J., in *Murphy v. Ryan*, Ir. R., 2 C. L. 148; Co., 2 Inst. 30; Woolrych, p. 197.

³ *Weld v. Hornby*, 7 East, 195; 3 Sm. 244.

⁴ 3 Ridg. P. C. 267.

L. C., in the case says:¹ “It is clear that the plaintiff, as proprietor of the upper fishery, has a right to the full possession of the water, the element of his fishery, in the same plight and condition in which he enjoyed it when the corporation, under whom the defendant derives, obtained their grant from the Crown; he has a right to a free passage for fish from the sea into his fishery, and he has a right to catch as many fish as he can catch by his industry and art which find their way into his fishery. It is clear that the defendant has the same rights as proprietress of the lower fishery. She has a right to the same full possession of the water, to a free passage of fish from the sea into her fishery. And she has a right abstractedly to catch every fish, which finds its way into her fishery, which she can lay hold of by her art or by her industry. But in the exercise of this right, she cannot alter the state, plight, or condition of the water of the plaintiff’s fishery from the state, plight, and condition in which she enjoyed it at the time when the corporation, under whom she derives, obtained their grant to the injury of plaintiff’s fishery; nor can she stop or obstruct the passage of fish from the sea into the plaintiff’s fishery in any manner not essentially necessary to enable her to exercise her right of catching fish in their passage up the river.”

Fishery in Private Streams.

Belongs *primâ facie* to owners of the bed as a territorial right.

In all rivers and streams above the flow and reflow of the tide, whether such rivers are navigable or not, the proprietors of the land abutting on the stream are *primâ facie* owners of the soil of the *alveus* or channel *ad medium filum aquæ*, and as such have *primâ facie* the right of fishing in front of their land.² “According to the well-

¹ 3 Ridg. P. C. p. 323.

² *Bickett v. Morris*, L. R., 1 Sc. App. 47; *Wishart v. Wyllie*, 1 Macq. H. L. 389; *Mayor of Car-*

lisle v. Graham, L. R., 4 Ex. 361; *Murphy v. Ryan*, Ir. R., 2 C. L. 143; *Lamb v. Newbiggen*, 1 Car. & K. 549; *Partheriche v. Mason*, 2

“established principles of the common law,” says O’Hagan, J., “the proprietors on either side of the river are presumed to be possessed of the bed and soil of it moiety to a supposed line in the middle, constituting their legal boundary, and being so possessed, have an exclusive right to the fishery in the water which flows above their respective territories.”¹ Where a man possesses land on both sides of the water, he has *primâ facie* the sole right of fishing therein.²

In the case of *Foster v. Wright*, where a river had formerly flowed wholly within the lands of one proprietor, and had by gradual and imperceptible degrees worn away its banks, and approached, and eventually encroached, upon the lands of the defendant, a proprietor adjoining, it was held, that the ownership of the soil to the bed still remained in the former proprietor, and that he could maintain an action of trespass against the defendant for fishing on a strip of the bed which, before the encroachment, had been his, defendant’s, property.³

This right is a right of property, one of the profits of the land, and has been called a *territorial fishery*. It is not, strictly speaking, a riparian right arising from the right of access to the water,⁴ but is a profit of the land over which the water flows, and as such may be transferred or appropriated either with or without the property in the bed or banks to another person, whether he has land or not on the borders of, or adjacent to, the stream.⁵

As this right, in the case of opposite proprietors, only extends *primâ facie* to the middle line of the water, each can only fish, whether with rods or nets, up to that

Rep. 658; *Fitzwalter’s case*, 1 Mod. 106; Hale de Jure Maris, p. 1; Bracton, lib. 1, c. 28, 31; see also *Cooper v. Phibbs*, L. R., 2 H. L. 165, per Lord Cranworth.

¹ *Murphy v. Ryan*, Ir. R., 2 C. L. 148.

² See Paterson’s Fishery Laws, p. 49; *Orr Ewing v. Colquhoun*, 2

App. C. 856.

³ 4 C. P. D. 438; see *ante*, p. 64.

⁴ See *Lyon v. Fishmongers’ Co.*, 1 App. C. 662.

⁵ *Marshall v. Ulleswater Co.*, 3 B. & S. 732; *Bristow v. Cornican*, 3 App. C. 665.

boundary; and if either casts his net or line beyond that boundary, he is liable to an action of trespass, unless he can prove a right to the whole fishery.¹

Is vested in
the occupier
of the lands.

The rights of shooting and fowling, unless specially reserved in a lease, are vested in the occupier or tenant of the lands, and not in the landlord.² From analogy, it would appear, that in an ordinary lease of lands, including waters and streams, the right of fishing is, unless specially reserved by the landlord, impliedly granted to the tenant as one of the profits of the land covered with water, included within the boundaries of his lease.³

Properly speaking, the right cannot be reserved by a lease, but what is practically the same thing, the reservation is construed as a re-grant by the tenant to landlord.⁴

Claims by
lords of
manors.

The presumption that the owner of the soil of the bed of a non-tidal river is also owner of an exclusive right of fishing therein, may be rebutted, but if not rebutted it is the legal presumption.⁵ If, therefore, the lord of a manor would intrude his claim, he must make it out by evidence of his own, as by deed, and the presumption that a several fishery passed to the lord as appurtenant to a manor under a deed, has been held to be rebutted by proof, that before the date of the deed the owners of the land had the right of free fishery.⁶

In waste
lands.

The lord of a manor, being *primâ facie* the owner of the waste lands of the manor, will be *primâ facie* entitled to the right of fishing in the waters of the waste.⁷ The words common or waste land, however, mean only those commonable lands of which the soil is in the lord, and not

¹ *Beauman v. Kinsella*, Ir. R., 11 C. L. 249; Paterson, p. 109.

² See 2 Will. IV. c. 32.

³ Paterson's Game Laws, p. 14; Paterson's Fishery Laws, p. 67; Oke's Game Laws, p. 118.

⁴ *Graham v. Ewart*, 7 H. L. 331; *Seymour v. Courtenay*, 5 Burr. 2817; Paterson, Fishery Laws, p. 68.

⁵ See *Wishart v. Wyllie*, 1 Mcq.

H. L. 389.

⁶ *Lamb v. Newbiggen*, 1 Car. & K. 549. See also *Grand Union Canal v. Ashby*, 6 H. & N. 403.

⁷ See Paterson, Fishery Laws, p. 54; Oke's Game Laws, pp. 50, 128; *Cornwell v. Saunders*, 32 L. J., N. S., M. C. 6; *Graham v. Ewart*, 26 L. J., N. S., Ex. 97; 7 H. L. Cas. 331.

open fields where owners had rights in severalty.¹ A lord of a manor is not justified in making such a store place for fish as to disturb the commonable rights of his tenants.²

Thus, if any one claims a right of fishery in another's water, the onus of proof is on him.

It has been said before that a claim by the public to fish in non-tidal waters has been held to be such a claim as cannot exist at law,³ or be supported by immemorial user.⁴ Moreover, a claim by custom for all the inhabitants of a parish to angle and catch fish in private waters,⁵ and a custom for the commoners, copyholders, and ancient freeholders of a manor, and their tenants, and the dwellers in the parish and manor to fish in the waste waters of a manor, have been held bad and unreasonable,⁶ on the ground that the right claimed was a *profit à prendre* on the soil of another, which might lead to the destruction of the subject-matter to which the alleged custom applied.⁷ Where the public have been allowed to fish in private waters, even from time immemorial, the permission is revocable at any time at the will of the proprietor.⁸

A claim by the public to fish in private waters cannot exist at law, or by custom.

A several or exclusive fishery in private waters may exist in a stranger by grant or prescription from the owner of the soil as an incorporeal hereditament.⁹ Such a fishery may, it would appear, be claimed as *appurtenant* to a

Several fishery apart from the ownership of soil.

¹ *Grand Union Canal v. Ashby*, 6 H. & N. 394.

² Cro. Car. 495; *Reeve v. Digby*. See also as to manors, Williams's Real Property, 119; *Doe d. Barrett v. Kemp*, 2 Bing. N. C. 102; *Grove v. West*, 7 Taunt. 39; *Smith v. Earl Brownlow*, L. R., 9 Eq. 241; *Warrick v. Queen's College*, L. R., 6 Ch. 716.

³ *Hargreaves v. Diddams*, L. R., 10 Q. B. 587; *Musset v. Burch*, 35 L. T., N. S. 486; *Hudson v. McRae*, 4 B. & S. 585.

⁴ *Murphy v. Ryan*, Ir. R., 2 C. L. 143. See *ante*, p. 344 *et seq.*

⁵ *Bland v. Lipscombe*, 4 E. & B. 413.

⁶ *Allgood v. Gibson*, 34 L. T., N. S. 883.

⁷ *Race v. Ward*, 4 E. & B. 702.

⁸ See *Holford v. Bailey*, 13 Q. B. 420.

⁹ *Marshall v. Ulleswater*, 3 B. & S. 732, per Wightman, J.; *Holford v. Bailey*, 13 Q. B. 426; 8 Q. B. 1016. See *Kinnersley v. Orpe*, Doug. 56.

manor, but not as appurtenant to land or a tenement, as being too extensive a right.¹

Whether
grant of,
passes soil.

The ownership of the soil of non-tidal rivers has been said to import a right to the exclusive fishery thereon; much controversy has arisen as to whether the converse of this proposition is true,—viz. that the ownership of a several fishery imports the ownership of the soil. On this point Lord Coke thus expresses himself: “If a man be seized of
“a river, and by deed do grant *separalem piscariam* in the
“same, and maketh livery of seisin *secundum formam*
“*chartæ*, the soil doth not pass, nor the water, for the
“grantor may take water there; and if the river become
“drye, he may take the benefit of the soile, for there passed
“to the grantee but a particular right, and the livery
“being made *secundum formam chartæ* cannot enlarge the
“grant. For the same reason if a man grant *aquam suam*
“the soile shall not pass, but the pischary within the water
“passeth therewith.”²

In the case of *Holford v. Bailey*,³ Lord Denman, C. J., delivering the considered judgment of the Court, says, at p. 1016, “No doubt the allegation of a several fishery, “*prima facie*, imports ownership of the soil, though they “are not necessarily united.” In the case of *Marshall v. Ulleswater Co.*,⁴ this question again arose, and the majority of the Court, Wightman and Mellor, JJ., held that a grant of a several fishery, together with livery of seisin, reserving a quit rent of 4*d.* a year to the then lord of the manor, must, in the absence of evidence to the contrary, be taken to convey a corporeal and not an incorporeal inheritance, as a feoffment with livery of seisin and the reservation of a quit rent are not appropriate to an incorporeal estate, and that, therefore, the soil passed by the grant. Cockburn, C. J., though holding himself

¹ Per Willes, J., in *Edgar v. Commissioners of Fisheries*, 20 L. T., N. S. 737, and *ante*, p. 351.

² Co. Litt. 4 b.

³ 8 Q. B. 1000. See also same case on appeal, 13 Q. B. 426.

⁴ 3 B. & S. 732.

bound by the case of *Holford v. Bailey*, was himself of a different opinion. After citing the opinion of Lord Coke, to the effect that a grant of a several fishery does not pass the soil, he proceeds:¹ "Now, independently of the high authority of Lord Coke on such a matter, I must say that this doctrine appears to me the only one which is reconcileable with principle or reason. It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why then should such a fishery be considered as carrying with it, in the absence of negative proof, the property in the soil? On the contrary, it seems to me that there is every reason for holding the opposite way. The use of the water for the purposes of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter; on a grant of the land, the water and the incidental and accessory right of fishery would necessarily pass with it. If, then, the intention be to convey the soil, why not convey the land at once, leaving the accessory to follow? Why grant the accessory that the principal may pass incidentally? Surely such a proceeding would be at once illogical and unlawfullike."

In the case of *Bloomfield v. Johnson*,² where the Irish Court of Exchequer Chamber held, that the grant of a *free* fishery in Lough Erne did not pass the soil, Fitzgerald, B., in his learned and elaborate judgment, after citing with approval the opinion of Coke above mentioned, says,³ "I am aware of no case prior to that of *Marshall v. Ulleswater Navigation Co.*, in which anything really inconsistent with the position of Lord Coke can be said to have been decided. It may be questioned, whether for the decision of that case it was necessary to dispute Lord Coke's position; but undoubtedly the judges who made that decision, especially Cockburn, C. J., who was dis-

¹ Page 747.² Ir. R., 8 C. L. 68.³ Page 105.

“satisfied with it, but held himself bound by former authorities, do appear to lay it down as law, that the grant of a fishery by the owner of the soil in the water of that soil, would, if accompanied by livery of seisin, pass the soil. But *Holford v. Bailey*, and that class of cases which, for this purpose, decide only that the allegation in pleading or otherwise of the ownership of a several fishery generally does, *prima facie*, imply the ownership of the soil, are the only authorities referred to, and this—I say it with deference—appears to me quite consistent with Coke’s position.”¹

As the law now stands it would, therefore, appear that where a grant of a several fishery is made, if nothing is known as to the ownership of the land, the grant will impliedly carry the soil, but as there is much difference of opinion among learned judges on this point, it cannot be taken to be finally settled.²

Free fishery.

A free fishery may exist in private waters by grant or prescription from the owner of the soil. It is sometimes also called a common of fishery, and is, as has been said, a right of fishery not exclusive in a particular place, and as such may exist in the owner of the soil in conjunction with a stranger, or in two or more strangers to the exclusion of the owner of the soil. “If he who is the owner of the soil, and as such entitled to the exclusive right of fishing, grant to another the right of fishing so as not to exclude himself, the grantee has a right of fishing not exclusive, but without the soil, and the owner of the soil retains the soil with a right of fishing no longer exclusive. The right of the grantee will be properly called—as all, I think, admit—a common of fishery. The right

¹ See Paterson, p. 65; *Rex v. Ellis*, 1 M. & S. 665, per Bayley, J.; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Hayes v. Bridges*, 1 R., L. & S. 420; *Scratten v. Brown*, 4 B. & C. 845.

² See Paterson, p. 65. In *Robinson v. Dhuleep Singh*, a grant of “all that warren of conies” was held to pass the soil of the warren, and not merely the franchise; 11 Ch. D. 798.

“ of the grantor is apparently something more, he has the
 “ ownership of the soil, the right of fishing incident thereto
 “ being no longer exclusive, but abridged by his grant;
 “ as against any one but his grantee, his rights are what
 “ they were before. If free fishery be the common name
 “ for this right of fishery in both cases, then, as applied
 “ to the grantee, it may be called synonymous with com-
 “ mon of fishery; as applied to the grantor, it will be
 “ something more.”¹

The ownership of a free fishery—*i. e.*, a fishery not exclusive—does not import the ownership of the soil, and a grant of free fishery by the owner of the soil has been held not to pass the soil *ad medium filum aquæ*. Thus, in *Bloomfield v. Johnson*,² where the question was whether a grant of lands adjacent to Lough Erne and of a several fishery in the lake passed the soil *ad medium filum aquæ*, the Court of Exchequer Chamber in Ireland held it did not; Fitzgerald, B., being of opinion that, assuming that the presumption that by a grant of lands adjacent to a fresh water river (the grantor being owner of the soil of the river), the soil of the river passed *ad medium filum aquæ*, applied to such a water as Lough Erne, the grant of a free fishery, when a several fishery might have been granted, was sufficient to rebut the presumption that the soil was intended to pass.

The right of fishing in private waters is, of course, User of fisheries. equally subordinate to the rights of navigation, which may have been acquired by the public over such waters by grant or prescription or Act of Parliament, and any interference with them will be a nuisance, and indictable.³

It has been held, however, that the provisions of Magna Weirs in private waters. Charta and of the other early statutes, including 17 Ric. II.

¹ *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68, per Fitzgerald, B., at p. 107. See also Co. Litt. 122 a.

² Ir. R., 8 C. L. 68; see *Alderman of London v. Hastings*, 2 Sid. 8.

³ *Williams v. Wilcox*, 8 A. & E. 333, per Lord Denman, C. J.; Hale de Jure Maris, c. 2. See *Orr Ewing v. Colquhoun*, 2 App. C. 839.

c. 9, and 12 *Edw. IV. c. 7*, which prohibit weirs, relate to navigable rivers only; and that though weirs in navigable rivers are illegal unless they existed before the time of Edward I., such an easement to a weir obstructing the fishery may be acquired in private waters by grant or prescription from the other riparian owners, or by enjoyment; in short, by any means by which such rights may be constituted.¹ It would seem that a claim to a weir is within the Prescription Act, and may be established by proof of enjoyment for the time required to confer easements with respect to water, and that the occasional interruption of the enjoyment of a weir so claimed by the owner of a mill on the banks of the river would not necessarily operate to destroy such a right. "We think," says Cockburn, C. J., "that there is nothing to prevent a second easement being acquired as subordinate to one already existing where the subject-matter admits of it. If the other riparian owners on the stream had granted to the appellant to have a weir for the purpose of taking fish at such times as the whole body of the stream was not needed for the working of the mill, such a grant would have been perfectly good, and would have conferred an easement *pro tanto*; we see no reason why such a qualified easement should not be acquired by user for the time required to confer easements in respect of water."²

Obstruction
of fishery
actionable.

The erection of a weir or other engine obstructing the passage of fish, though not a public nuisance and indictable, is, as has been said, an interference with the rights of the owners of other fisheries, and is as such *prima facie* actionable, as is also the enhancing and enlarging of existing weirs.³

Thus in the case of *Weld v. Hornby*,⁴ the converting of

¹ *Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657; *Callis on Sewers*, p. 259; *Coke*, 2 Inst. p. 38; *Chester Mill case*, 10 Co. Rep. 138.

² *Rolle v. Whyte*, L. R., 2 Q. B.

302. See also per Bovill, C. J., in *Leconfield v. Lonsdale*, L. R., 5 C. P. 726.

³ 7 East, 195.

⁴ L. R., 5 C. P. 725.

an ancient brushwood weir through which fish could pass, into an impenetrable stone weir was held actionable at the suit of another owner prejudiced thereby. In this case the *locus in quo* was thought by Lord Ellenborough to be a navigable river, and he expressed an opinion that the weir was a public nuisance; this, however, turned out not to be the case, and is thus alluded to by Bovill, C. J., in *Leconfield v. Lonsdale*,¹ "It was an action for a private nuisance, " and unquestionably maintainable in respect of the plaintiff's private right of property, which was injured by the " act of the defendant in making his weir impervious to " fish, and so preventing them from arriving at the plaintiff's fishery, a grievance long recognized as giving a " right of action, independent of any question of public " nuisance. See the precedent in the last case of year " 46, *Lib. Assis*." In fact any unauthorized interference with the passage of fish up a river would appear to be actionable at the suit of the owner of a fishery who suffers damage thereby.²

The pollution of the water of a stream, so as to render it unfit for fish to live in, is, moreover, actionable, and ground for the interference of the Court by injunction.³

Fishery in Lakes and Pools.

With regard to the law as to fishery in small ponds or pools, included in one property or manor, there can be no doubt but that the owner of the property or manor has *prima facie* the exclusive right to fish therein.⁴ Where the boundary of two properties passes along the pool, it is

In ponds and pools.

¹ L. R., 5 C. P. 725.

² See *Marquis of Donegal v. Hamilton*, 3 Ridg. P. C. 267; *Murphy v. Ryan*, Ir. R., 2 C. L. 148.

³ *A.-G. v. Birmingham*, 4 K. & J. 528; *Bidder v. Croydon*, 6 L.

T., N. S. 778; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Oldaker v. Hunt*, 6 D., M. & G. 376; *Aldred's case*, 9 Rep. 59 a. See *ante*, Ch. III. p. 150 *et seq.*

⁴ See Paterson, *Fishery Laws*, p. 2.

taken to coincide with the *medium filum* of the pool, and the fishery will of course follow this boundary line.¹

Though fish are animals *feræ naturæ*, which cannot be the subject of larceny at common law, it seems that fish in a small pond, tank, or stew in the owner's land, where they can be caught at pleasure, are more like chattels, and may be the subject of larceny; this seems to depend on the size of the pond, but no one has attempted to define how large the pond or lake must be, where larceny ends.²

In large
navigable
lakes.

With regard to the right of fishing in large navigable non-tidal lakes, the law does not appear to be so clearly settled. As has been said before the public right of fishery cannot exist in non-tidal rivers, where the presumption is that the respective owners on the banks are entitled to the exclusive fishery *ad medium filum aquæ*, though this presumption may be rebutted. In accordance with this principle, the Irish Court of Exchequer Chamber, in *Bloomfield v. Johnson*,³ has held, with some hesitation, affirming the judgment of the Court of Common Pleas, that there is no public right of fishery in large navigable and non-tidal lakes.

The same point was raised in a later case on demurrer, and the Irish Court of Exchequer held themselves bound by the prior decision of the Exchequer Chamber in *Bloomfield v. Johnson*, which they could not question. No appeal was brought from this judgment on the demurrer; but on an appeal to the Irish Exchequer Chamber, from an order of the Court making absolute a conditional order for a new trial, on the ground of mis-direction on other grounds, Whiteside, C. J., strongly expresses his dissent from the above principle.⁴ "If this vast sheet of water," he says, "be navigable and navigated for the convenience of the

¹ Phear's Rights of Water, p. 1; Woolrych on Waters, p. 121. See also per Lord Blackburn in *Bristowe v. Cormican*, 3 App. Cas. 665.

² Paterson, p. 72; *Grey's case*, Ow. 20; 1 Hale, Pl. C. 510,

511; East, Pl. C. 610, *R. v. Hunsdon*.

³ Ir. R., 8 C. L. 68. See *ante*, p. 346, and as to the ownership of the bed of lakes, *ante*, Ch. II. p. 98.

⁴ *Bristowe v. Cormican*, Ir. R., 10 C. L. 434.

“surrounding inhabitants,—if the lake affords a common passage for public use,—if its navigation be watched over and assisted by the grand juries of four surrounding counties, for the benefit of the subject,—why should not the right of fishing in this inland sea be enjoyed and exercised by the public, as well as the right of passage for trade, traffic and enjoyment, subject to the servitudes and prerogatives belonging to the king? The lake, answers the lawyer, to give the right of fishing to the public, should be navigable. It is navigable, answer the inhabitants of four counties. No, retorts the lawyer, navigable in fact is one thing, navigable in law is another. ‘‘ Navigable,’ writes Lord Hale, ‘ means tidal, and, unless the salt water flows and recedes, the lough is not legally navigable; and if the water be fresh, though as wide as three counties, and teeming with fish, the public cannot take one fish in the exercise of their industry in procuring sustenance for themselves and others; the liberty of fishing, which is of common right in the creeks and arms of the sea or navigable rivers, does not exist in vast sheets of water or inland seas, because the water is not salt—an arbitrary rule repugnant to reason, convenience, and the common sense of mankind.’ Inquisitive lawyers have raised the question, did Lord Hale really propound dogmatically that navigable in law meant tidal, not that it really was so? But the authorship is made a question in a note to *Calmady v. Rowe* (6 C. B. 878). It may be fairly said this question should now be thoroughly investigated on principle, and decided according to analogy and reason, by the ultimate Court of Appeal, by which tribunal alone it can be decided.”

The case went on appeal to the House of Lords; but as the question of the public right of fishing in the lake was not before the House, no decision on that point was given. Cairns, L. C., says at p. 651,¹ “The defendants

¹ 3 App. Cas.

“in the action, the respondents, had pleaded a special
 “defence, alleging that Lough Neagh was a public
 “or common navigable inland sea, and every subject
 “of the realm had a right of fishing in it, and justifying
 “their trespass under this right. To this special defence
 “there was a replication, averring that the tides of the
 “sea had never flowed in Lough Neagh, and to this repli-
 “cation there was a demurrer, which demurrer was over-
 “ruled. Against the order overruling this demurrer the
 “respondents have not appealed, and the appellants
 “remain, therefore, the victors on that issue. My lords,
 “I mention this in order to show that it does not appear
 “to me that your lordships can decide, whether the repli-
 “cation to which I have referred was or was not a valid
 “defence in law. That may be a fit question to raise in
 “some other case; but it cannot for the reasons I have
 “mentioned be raised in this case.”¹ Lord Blackburn in
 the same case seems to be clear that the Crown has no
 right to the soil or fishery in such lakes; but thinks it
 doubtful whether the rule, that such adjoining proprietor
 is entitled to the soil *usque ad medium filum aquæ* (and
 consequently to the fishing therein), applies to such lakes
 as Lough Neagh. After referring to certain dicta of
 Wightman, J., in *Marshall v. Ulleswater Co.*, he continues,
 “This is the only case cited, and, as far as I can find, the
 “only case which exists, where there is even a suggestion
 “that the Crown of common right is entitled to the soil of
 “lakes. Neither the passage in Comyns, nor that in
 “Hale de Jure Maris, cited by Mr. J. Wightman, gives
 “any countenance to such doctrine. But it did appear
 “that the learned judge did not think the law as to land
 “covered by still water was so clearly settled to be the
 “same as the law as to land covered with running water,
 “as to justify him in unnecessarily deciding that it was
 “the same. More than this I think does not appear from
 “that case. I own myself to be unable to see any reason

¹ See also per Lord Gordon, p. 671. As to the right of fishery in lakes, see also *Marshall v. Ulleswater Co.*, 3 B. & S. 732.

“ why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad medium filum aquæ* should apply to a lake, is a different question. It does not seem very convenient that such proprietor of a few acres, fronting on Lough Neagh, should have a piece of the soil of the lough many miles in length tacked on his frontage.”

In *Reg. v. Burrow*,¹ a conviction by magistrates of defendant for fishing in Ulleswater was quashed by the Court, on the ground that a *bonâ fide* claim by defendant, as one of the public, to fish there, ousted their jurisdiction, the point not being so fully settled by authority as to make the claim one which could not exist at law.²

The right of fishery in canals and artificial watercourses is of course incident *primâ facie* to the ownership of the soil, as is the case in all other non-tidal waters, and it is clearly competent for the canal proprietors to let their right of fishery, if they should see fit.³ In many cases the right of fishery is regulated by the Act of Parliament creating the canal, and, in that case, will of course depend on the construction of the Act.

Canals and
artificial
waters.

Thus, where a canal was made through a manor, and it was enacted by statute that the lord of the manor should have the fishing in so much of the canal, or cut, or reservoir, as should be made in, over, or through the common or waste lands of the manor; and the owner of any other lands should have a like right of fishery in so much of the collateral cut as should be made in, over, or through his lands; it was held that the words “common or waste” meant those commonable lands of which the soil was in the lord, and not open fields where owners had rights of

¹ 34 Justice of Peace, 53.

² See, however, *Hargreaves v. Diddams*, L. R., 10 Q. B. 587; *Hudson v. McRae*, 4 B. & S. 495,

and per Lord Blackburn in *Bristowe v. Cormican*, 3 App. Cas. 665, ante.

³ Woolrych on Waters, p. 65.

severalty, and that the lord had only the right of fishing in the canal or cut over his lands, and not in the reservoir.¹

Statutory Regulations affecting Fishery.

General enactments for protection of fish.

Larceny Act.

Salmon.

Freshwater fish.

Poaching.

The statute laws relating to fishery, and framed for the protection of fish as a valuable source of food supply, are chiefly important as regulating the season during which fish may be caught, and the means which may be employed in catching them. In addition to this, the Larceny Act (24 & 25 *Vict. c. 96*) declares the law with regard to poaching fish. The importance of salmon, as an article of food, has occasioned the passing of numerous statutes for its protection.

The principal Acts now in force relating to salmon, and which are, so far as is consistent, to be read as one Act, are 24 & 25 *Vict. c. 109*; 26 *Vict. c. 10*, s. 3; 28 & 29 *Vict. c. 121*; 36 & 37 *Vict. c. 71*; 39 & 40 *Vict. c. 19*.

With regard to other freshwater fish, except as to trout, char, eels, and lamporns in a salmon river, there were no restrictions whatever as to season or means of capture, until the passing of the Freshwater Fisheries Act (41 & 42 *Vict. c. 39*). With regard to sea fish, there are no statutory restrictions imposed on their capture, except by the convention with France embodied in the statute 31 & 32 *Vict. c. 45*, which regulates the fisheries within certain limits therein specified.

It is proposed to consider shortly the principal of these Acts, and then to treat more fully of the various restrictions imposed by them on—1st, the season, and, 2nd the means, during and by which, the various fish protected may be caught. Finally, a sketch will be given of the law relating to the poaching of fish.²

¹ *Grand Union Canal Co. v. Ashby*, 6 H. & N. 394. See also *Snape v. Dobbs*, 8 Moo. 23; *Pater-son*, p. 66. See *ante*, Ch. V. p. 280.

² There are various Local Fish-ery Acts in force (the provisions of which cannot be noticed here), *e.g.*

40 & 41 *Vict. c. 98*, as to Norfolk and Suffolk fisheries: 39 & 40 *Vict. c. 34*; 18 *Geo. III. c. 3*, as to the Severn: 20 & 21 *Vict. c. 148*; 27 & 28 *Vict. c. 113*; 29 & 30 *Vict. c. 89*; 30 & 31 *Vict. c. 101*, as to the Thames.

By the Sea Fisheries Act,¹ and the convention thereto annexed, between her Majesty the Queen and the Emperor of the French, the fisheries in the seas adjoining the coasts of Great Britain and Ireland, and the coasts of France between Belgium and Spain, are regulated and protected. British fishermen are to enjoy the sole right of fishing within three miles of low water mark on the British coast; and French fishermen are to enjoy the sole right within three miles of the French coast, except as to that part of the coast of France between Cape Carteret and point Meinga. This distance of three miles with respect to bays, the mouths of which do not exceed ten miles in width, is to be measured from a straight line drawn from headland to headland; all fishermen are to be licensed, and their boats numbered; and various articles regulate the respective rights of drift nets, and trawl fishing, and oyster fishing. The cruisers of either nation are to take cognizance of all infractions of the regulations, and all offenders requiring exemplary punishment are to be sent to their own country for trial. Fishing boats of either country are to be admitted to sell their fish in such ports of the other country as are designated for that purpose. The fishing boats of one country are not to enter the fishing limits of the other, unless by stress of weather, contrary winds, &c. Officers appointed by the Board of Trade and officers of the navy, coast guard, and consular officers, are given powers to board and examine boats, and take offenders without warrant before any justice of the peace. Persons obstructing the officers, or acting in contravention of the Act within the exclusive fishery limits of Great Britain on board a boat, either British or French, are deemed to have committed an offence against the Act.

Sea Fisheries Act.

By Part III. of the Act it is provided, that the Board of Trade may make an order for the establishment or improvement of oyster or mussel fisheries on the shore or

Oyster fisheries.

¹ 31 & 32 Vict. c. 45.

bed of the sea, or of an estuary or tidal river, and after notice given and the inquiry, and report of an inspector, may either confirm such order or not as seems fit. No order is to be valid until confirmed by Act of Parliament. When such order has been confirmed, the grantee, subject to such restrictions as the order contains, is to have within the limits defined the sole right of depositing, fishing, dredging, &c. for oysters and mussels. Where an order has been made, only conferring a right to regulate such a fishery, and to levy tolls, &c., such order does not confer a right to the fishery, but only to regulate it and take tolls. Any person fishing in such a fishery without paying the tolls granted, is liable, on summary conviction, to pay 20*l.* and to forfeit all oysters and mussels taken. The portion of sea shore comprised in such an order is to be deemed to be within the adjoining county for purposes of jurisdiction; such grants are not to be made for longer than sixty years. No rights of several fishery are to be interfered with, and compensation is to be paid to owners of land taken. All oysters and mussels within such fishery, or in any several fishery enjoyed independent of the Act, are made the absolute property of the grantees or owners, and are to be deemed to be in their actual possession for all purposes, civil or criminal. Various restrictions, which will be noticed afterwards, are imposed on the season for, and mode of, taking oysters.

Salmon
Fishery
Acts.

Formation of
conservancy
districts and
boards.

By the *Salmon Fishery Act*, 1861,¹ and the *Salmon Fishery Amendment Act*, 1865,² it is provided, that for the protection of salmon fisheries, the justices of a county, at any Court of Quarter Sessions, may apply to the Secretary of State to form into a fishery district or districts, all or any of the salmon rivers within their county. Where such district is formed, a board of conservators may be appointed by the Court of Quarter Sessions for enforcing the pro-

¹ 24 & 25 Vict. c. 109, s. 33.

² 28 & 29 Vict. c. 121, s. 6.

visions of the Fishery Acts within their jurisdiction. Where a fishery district does not lie wholly within one county, a fishery committee of three members from each county are to appoint a board of conservators.¹

All owners or occupiers of a fishery in such district, which is rated to the poor at the gross rental of 30*l.* per annum, and all owners of land in the district of the annual value of 100*l.*, having a frontage of not less than a mile on any salmon river, are to be *ex officio* members of the board;² and in districts where there are any public fisheries, additional members may be elected by licensed fishermen fishing in the public waters.³

A fishery district may be altered, by including or excluding any salmon river or part of it, by certificate from the Secretary of State.⁴ The word river is defined as including "such portion of any stream or lake, with its tributaries, and such portion of any estuary, sea, or sea coast, as may from time to time be declared by the certificate of the Secretary of State to belong to such river."⁵ Where more than one river flows into an estuary, the Secretary of State may define the limits of such estuary, and form it into a separate district.⁵

The proceedings of the Boards of Conservators are regulated by sects. 21 to 26 of 28 & 29 *Vict. c.* 101. Proceedings
of board.

The Boards of Conservators have powers within their districts to appoint water bailiffs (for which purpose they may obtain the services of additional constables under 3 & 4 *Vict. c.* 88, s. 19, with all the powers and privileges of water bailiffs); to issue licences for fishing with rods and nets, and for fishing weirs, milldams, &c.; to purchase compulsorily or otherwise,⁶ for removal only, dams, fishing weirs, milldams, and fixed engines; to take proceedings against persons violating the Acts; and generally to do such acts as they may deem fit for the improvement of Powers of
boards.

¹ Sect. 7.

² 36 & 37 *Vict. c.* 71, ss. 26, 29.

³ 28 & 29 *Vict. c.* 121, s. 20.

⁴ Sects. 3, 5.

⁵ 28 & 29 *Vict. c.* 71, s. 49.

⁶ 36 & 37 *Vict. c.* 71, s. 49.

the fisheries: provided that nothing be done which may injuriously affect any navigable river, canal, or inland navigation.¹

Bye-laws.

Further they may make bye-laws¹ to alter the limits of the annual and weekly close season within their district; to determine the length, size, and mesh of nets, and the mode of using them; to determine the form and rate of licences, and the marks attached to licensed nets or boats; to prohibit the use of nets within certain distance of any river, not being a several fishery, and to determine when the gaff may be used; to regulate the gratings to be placed in artificial channels; to regulate the use of nets for fish, other than salmon, prejudicial to salmon fishery, during the annual and weekly close seasons; to prohibit the use in any inland water of any net except a landing net, or a net for taking eels, between the first hour after sunset and the last hour before sunrise. They are also empowered to alter the close season for trout² and char³ in their district. They may impose penalties not exceeding 5*l.* for each offence against the bye-laws;⁴ all such bye-laws must be confirmed by the Secretary of State before coming into operation.⁵

Powers of
water bailiffs.

Any water bailiff may examine any weir, fixed engine or obstruction, or any artificial watercourse connected with a salmon river; stop and search any boat which he has reasonable cause to suspect contains salmon, and seize any fish or fishing instrument, &c. forfeited under the Acts; search and examine any nets used by persons whom he has reasonable cause to suspect of having possession of fish illegally caught, and seize the fish. All persons resisting or obstructing such search to be liable to a penalty of 5*l.*; for the enforcement of the Act all water bailiffs to have the powers of constables; and the production of the instrument of their appointment to be their warrant.⁶ A water

¹ 28 & 29 Vict. c. 121, s. 27.

² 39 & 40 Vict. c. 19, s. 4.

³ 41 & 42 Vict. c. 39, s. 10.

⁴ 36 & 37 Vict. c. 71, s. 49.

⁵ Sect. 41.

⁶ Sect. 36.

bailiff may, moreover, under special order of the Board, enter on any lands, at reasonable times, to prevent breaches of the Salmon Fishery Acts;¹ and may, together with any assistants, apprehend any person illegally taking salmon, or found near a salmon river with the intent to take salmon, between the first hour after sunset, and the last hour before sunrise.²

A justice may further, on information on oath that there is probable cause to suspect any breach of the Acts on any premises, by warrant, empower any inspector, water bailiff, conservator, constable, or police officer, to enter such premises, and seize any illegal engines or salmon illegally taken. No such warrant is to continue in force for more than one week.³

For the further protection of fish it is enacted, that where salmon are led aside out of a stream into any artificial channel for supplying towns with water, or for supplying a navigable canal, the persons having the control of such artificial channel, must put up and maintain gratings, to prevent the descent of salmon or young salmon, as approved by one of the inspectors of fisheries.⁴ A Board of Conservators may, moreover, order a grating to be placed at the expense of the Board, in any watercourse, mill race, or leat, during such seasons of the year as may be prescribed;⁵ and may widen any channel so as to compensate for any diminution of any flow of water caused by the erection of the gratings;⁶ and may also, with consent of Secretary of State, adopt such measures as he may approve, for preventing ingress of salmon into streams unfitted for spawning;⁷ the owners of lands to preserve such gratings from injury.⁸

The general superintendence of the salmon fisheries in England is vested in the Home Office, which may appoint two inspectors of fisheries for three years. The inspectors

Gratings.

Inspectors
and commis-
sioners.

¹ Sect. 37.

² Sect. 38.

³ 24 & 25 Vict. c. 109, s. 34.

⁴ Sect. 13.

⁵ 36 & 37 Vict. c. 71, s. 58.

⁶ Sect. 59.

⁷ Sect. 60.

⁸ Sect. 61.

are to make annual reports, containing a statistical account of the fisheries.¹ Commissioners may be appointed by her Majesty to inquire into the legality of any fixed engines, and to abate and remove all such as are not proved to their satisfaction to be privileged, and to inquire into the legality of fishing weirs and fishing mill dams, and to remove such fishing weirs, and cause to be incapable of catching fish such fishing mill dams, as are in contravention of the Act.² Certificates are to be given stating the situation, size, and description of engines proved to be privileged.³

Notice is to be given in some daily London paper, and in some paper circulating in the district, of the place where and time when the Commissioners will be prepared to hold a Court for determining the legality of fishing weirs, dams, and fixed engines in such district.⁴ An appeal lies from the decision of Commissioners, by special case, to any of the Superior Courts of Westminster.⁵

The Fresh-
water
Fisheries Act.

By *The Fresh Water Fisheries Act*, 1878, which is to be read as one with *The Salmon Fishery Acts*, 1861 to 1876, the provisions of *The Salmon Fishery Acts*, 1865 and 1873, which relate to the formation and regulation of conservancy districts, and the appointment and powers of conservators, are extended to all waters in England and Wales, except to the counties of Norfolk and Suffolk, and the city of Norwich, frequented by trout and char; and the term salmon river in the 4th and 19th sections of the Act of 1865, and in sect. 26 of the Act of 1873, are to mean any river frequented by salmon, trout, and char.⁶ In any district subject to a Board of Conservators, the provisions of the Acts of 1865 and 1873, relative to licences, are to be construed as if the words trout and char were inserted

¹ 24 & 25 Vict. c. 109, ss. 31, 32.

² 28 & 29 Vict. c. 121, ss. 40, 42, 46, 55.

³ Sect. 41. The powers of appointing inspectors and commis-

sioners is renewed every year by the Expiring Laws Continuance Acts.

⁴ Sect. 43.

⁵ Sect. 45.

⁶ 41 & 42 Vict. c. 39, s. 6.

after the word salmon ;¹ and the powers of water bailiffs under those Acts are to extend to all waters within the limits of the Act, as if the words salmon rivers, wherever they occur, included all waters frequented by salmon, trout, and char.² The provision of sect. 34 of the Act of 1861, as to search warrants, is to extend to all offences within the Act.

On the high seas, as has been said, fish of all kinds may be taken, at all seasons, and by all means.³

The fishery for all kinds of fish in the territorial waters of the realm below low water mark, seems to be free from legal restrictions as to season, with the exception of the coast of Cornwall east of Trevoze Head, where the use of drift or trawl nets is prohibited within two miles of low water mark, from sunrise to sunset, between July 25th and November 25th ; it being also illegal during that season for any boat not engaged in seine fishing, to anchor or use any implement, except for the purpose of seine fishing, within half a mile of any sea boat engaged in seine fishing.⁴

Statutory provisions as to the season during which it is illegal to catch fish.

High seas.
Territorial waters.

By a convention between the British and French Governments, incorporated into the Sea Fisheries Act, fishing for oysters in the Channel beyond three miles from the coasts of England and France, within a line drawn from North Foreland to Dunkirk, and a line drawn from the Land's End to Ushant, is prohibited from June 16th to August 31st ; and during that time in the same part of the Channel, no boat may have on board any oyster dredge, unless the same be sealed up by the customs authorities, so as to prevent it being made use of.⁵ This convention would appear to be binding only on the subjects of England and France, so far as it relates to the sea beyond the limits of the territorial waters of either country.

Oysters.

¹ Sect. 7.

² Sect. 8.

³ As to this, see Article 10 of the convention attached to 31 &

32 Vict. c. 45.

⁴ 31 & 32 Vict. c. 45, s. 68.

⁵ See convention annexed to 31 & 32 Vict. c. 45.

By sect. 19 of 31 & 32 *Vict. c. 45*, all restrictions whatever in England on the sale of sea fish (except salmon), which is not diseased, unsound, unwholesome, or unfit for the food of man, are abolished.

The restrictions on the sale of salmon during the close season, do not apply to fish caught beyond the limits of the Salmon Fishery Acts; and it seems somewhat doubtful whether the territorial waters within three miles of low water mark would be, according to the judgment in *Reg. v. Keyn*,¹ so within the limits of the Act, as to make the possession of salmon caught out of season, within three miles of shore, illegal.

Inland
waters.
Salmon.

No salmon² may be taken in any river (the term river including such portion of any stream or lake with its tributaries, and such portion of any estuary, sea, or sea-coast as may be declared by the certificate of the Secretary of State to belong to such river³) between 1st September and 1st February, both inclusive, under heavy penalties.⁴ If the river is in a fishery district the Board of Conservators have powers to vary the close time.⁵ Fishing for salmon with rod and line only may be lawfully carried on until the 1st November inclusive.⁶ No person may take salmon except with rod and line during the weekly close season—*i. e.*, from noon on Saturday till six on the following Monday morning.⁷ This time may be varied by the conservators of each district.⁵

No person may, during the weekly close season, place any obstruction or do any act for the purpose of deterring salmon from passing up a river.⁸

Any person acting in contravention of these provisions is liable to forfeit all fish taken by him, and any net or moveable instrument used by him in taking the same, and further to a penalty of 5*l.*, and 1*l.* for every fish so taken. A net so used for the purposes of taking salmon has been held to

¹ 2 Ex. Div. 68.

² For definition of salmon, see 24 & 25 *Vict. c. 109*, s. 4.

³ 28 & 29 *Vict. c. 121*, s. 3.

⁴ 24 & 25 *Vict. c. 109*, s. 17.

⁵ 36 & 37 *Vict. c. 71*, s. 39.

⁶ 24 & 25 *Vict. c. 109*, s. 17.

⁷ Sect. 21.

⁸ 36 & 37 *Vict. c. 71*, s. 16.

be forfeited, although the defendant who used it caught nothing.¹

No person, whether the owner of a fishery or not, may take, buy, or sell or possess unclean or unseasonable salmon, unless such fish be taken accidentally or for scientific purposes;² or take, destroy, buy, sell, or possess, obstruct, or injure the young of salmon, or disturb a spawning bed.³ All fixed engines must be removed during the annual close time within thirty-six hours of its commencement;⁴ and during the weekly close season a free passage must be left through cribs, boxes, and cruives.⁵

No trout or char may be taken in any river between October 1st and February 1st, both inclusive, under a penalty of 2*l.* for each offence, and forfeiture of all fish taken.⁶ A Board of Conservators has power, however, to vary the close time in its particular district.⁷

No person between January 1st and June 24th may fix in any salmon river—*i. e.*, in a river frequented by salmon or the young of salmon—any basket, net, trap, or device for taking eels or the fry of eels, or place in any inland water any device whatsoever to catch or obstruct any fish descending the stream.⁸

No person shall place at any time upon the apron of any weir any basket, trap, or device for taking fish, except wheels or leaps for taking lamperns, between the 1st August and 1st of March.⁸

No person may, between March 15th and June 15th, both inclusive, fish for, catch, or attempt to catch any fresh water fish—*i. e.*, any fish other than pollen, trout, and char, which live in fresh water, and do not migrate to the open sea.

¹ *Rutter v. Harris*, 1 Ex. Div. 97.

² 24 & 25 Vict. c. 109, s. 14.

³ Sects. 15, 16.

⁴ Sect. 20.

⁵ Sect. 22.

⁶ 41 & 42 Vict. c. 39, s. 5; 28 & 29 Vict. c. 121, s. 64.

⁷ 39 & 40 Vict. c. 19. In the Thames, the close seasons are as

follows: — For salmon, salmon trout, and trout, from September 10th to March 31st, inclusive. For other fresh water fish, including eels (as to eels, see *Woodhouse v. Etheridge*, L. R., 6 C. P. 570), from February 14th to May 31st, both inclusive. See Oke's Fishery Laws, p. 33.

⁸ 36 & 37 Vict. c. 71, s. 15.

Trout, &c.

Eels, &c. in salmon river.

Fish descending stream.

Lamperns.

Freshwater fish other than trout or char.

Nothing in this section is to apply—(a) To the owner of any several or private fishery where trout, char, or grayling are specially preserved, destroying within such fishery any freshwater fish other than grayling; (b) To any person angling in any several fishery with leave of the owner, or in any public fishery under a Board of Conservators, with leave of the said Board; (c) To any person taking fish for a scientific purpose (d) or for bait.

A Board of Conservators, under the Acts of 1861 and 1876, may, however, as regards any or all kinds of fresh water fish, with the approval of the Secretary of State, exempt the whole or any part of their district from the operation of the foregoing provisions of the section.¹

Selling
salmon, trout,
or char in
close season.

No person may buy, sell, or expose for sale, or have in his possession for sale, any salmon, or part of any salmon, between the 3rd September and 1st of February following, both inclusive,² or any trout or char between 2nd October and the 1st of February following, both inclusive.³ This does not apply to salmon cured beyond the limits of the United Kingdom, or within the limits of the United Kingdom between February 1st and November 3rd, or to any clean fresh salmon caught within the limits of the Act, provided its capture by any net, instrument, or device other than a rod and line was lawful at the time and in the place where it was caught; or to any clean fresh salmon caught beyond the limits of the Act, provided its capture by any net, instrument, or device other than a rod and line, if within the United Kingdom,⁴ was lawful at the time and place where it was caught. The burden of proof in all cases to be on the person selling.

Taking un-
seasonable
salmon, trout,
and char.

No person may wilfully take, kill, or injure, or attempt to take, or buy or sell, or have in his possession, any unclean or unseasonable salmon, trout, or char.⁵

¹ 41 & 42 Vict. c. 39, s. 11.

² 36 & 37 Vict. c. 71, s. 19; 24 & 25 Vict. c. 123, s. 21.

³ 36 & 37 Vict. c. 71, s. 20.

⁴ See *ante*, p. 382.

⁵ 24 & 25 Vict. c. 109, s. 14; 36

& 37 Vict. c. 71, s. 18. As to measuring of unseasonable salmon, trout, char, &c., see Oke's *Fishery Laws*, 2nd ed. p. 41; Bund's *Law of Salmon Fisheries*, p. 336.

There appear to be now no general¹ legal restrictions on the means of catching sea fish, except salmon, in the sea or inland waters. The various statutes regulating the kinds of nets to be used, and the size of mesh allowable, have been repealed by *The Sea Fisheries Act*, 1867,² so far as relates to England;³ and the Fresh Water Fisheries Act expressly excludes all fish which migrate to the sea.⁴ The only exception to this freedom of fishery is that contained in *The Fisheries (Dynamite) Act*, 1877,⁵ which prohibits the use of dynamite or other explosive substance for the catching or destruction of fish in any public fishery, and defines a public fishery as including the sea within a marine league of the coast.⁶

Statutory provisions as to the means by which it is illegal to catch fish.

Sea fish other than salmon.

By the Sea Fisheries Act, it is made unlawful for any person, other than the owner or grantee of an oyster bed, or their servants, to fish there with any implement except a line and hook, adapted solely for catching floating fish, or so used as to disturb the oyster bed, or to dredge for or deposit ballast, or to place any instrument prejudicial to the oyster bed, except for a lawful purpose of navigation or anchorage, or to disturb in any other way such oyster bed, under penalties; such person being at the same time liable to make compensation for all damage done, provided only that the oyster bed be properly marked out and known.⁷

With regard to salmon, the restrictions imposed by *The Salmon Fisheries Acts*, 1861—1876, appear only to apply to inland and tidal waters, as defined by the 24 & 25 Vict. c. 109, s. 4, including estuaries, and the sea shore to low water mark. By 41 & 42 Vict. c. 39, the provisions of *The Fisheries (Dynamite) Act* are extended to all private fisheries, and no person, even the owner, may use dynamite

¹ As to regulation of pilchard fisheries in the bay of St. Ives, Cornwall, see 4 & 5 Vict. c. 57.

Laws, p. 247.

⁴ 41 & 42 Vict. c. 39.

⁵ 40 & 41 Vict. c. 65.

⁶ Sect. 3.

⁷ 31 & 32 Vict. c. 45, ss. 53, 54.

³ As to Scotland, see Paterson's Fishery Laws, p. 165. As to Ireland, see Paterson's Fishery

See 28 & 29 Vict. c. 121, ss. 3, 5.

or any other explosive substance to kill fish in the United Kingdom. No person may put any lime or other noxious material into any water with intent to destroy fish,¹ or cause, or knowingly permit to flow or be put into any waters containing salmon, or into any tributary thereof, any liquid or solid matter to such an extent as to poison or kill fish, unless in the exercise of any right to which he is by law entitled, in which case he is not to be liable to any penalty, if he prove to the satisfaction of the Court before whom he is tried, that he has used the best practical means, within a reasonable cost, to render harmless the liquid or solid matter so permitted to flow or put into such waters.²

No person may, in any non-tidal water, use any device to obstruct fish descending the stream.³ No person may use, or have in his possession, any otter lath, jack, wire, or snare, light, spear gaff, strokeall, or snatch for taking salmon, or use for fishing, or have in his possession, any fish roe.⁴ No person may fish for salmon with a net having a mesh of less dimensions than two inches in extension from knot to knot, the measurement to be made on each side of the square, or eight inches measured round each mesh when wet; but the conservators of any district may, by bye-law, determine the length, size, and description of net to be used in their district.⁵

Licences.

No person may fish for salmon in any fishery, either with rod and line, or net, or weir, or fixed engine, without a proper licence.⁶

No person may shoot or work any seine or draft net, reaching across the whole or two-thirds of the width of a river within 100 yards of another, until the first is drawn in.⁷

Dams, fishing weirs, and fixed engines.

No person may use any fixed engine,⁸ dam or fishing weir for taking salmon, unless lawfully existing at the

¹ 24 & 25 Vict. c. 97, s. 32.

² 24 & 25 Vict. c. 109, ss. 5, 6.
See Rivers Pollution Act, 39 & 40
Vict. c. 75.

³ 36 & 37 Vict. c. 71, s. 15.

⁴ 24 & 25 Vict. c. 109, ss. 8, 9.

⁵ *Ib.* s. 10, 28 & 29 Vict. c. 121, s. 27.

⁶ 28 & 29 Vict. c. 121, ss. 33—
37; 36 & 37 Vict. c. 71, s. 22.

⁷ *Ib.* s. 14.

⁸ 24 & 25 Vict. c. 109, s. 11; 28 &
29 Vict. c. 121, s. 39, see *post*, p. 391.

passing of the Act.¹ No person may catch or kill, or attempt to catch or kill, except with rod and line, or scare, or disturb, or attempt to scare or disturb, any salmon within 50 yards above, or 100 yards below, any weir or dam, or in any waters under, or appurtenant to, a mill, or in the head race or tail race of a mill, or in any waste race or pool communicating with the race, or in any artificial channel connected with such weir; and no person may fish with rod and line in such a manner, or in such a place, so as unlawfully to scare or hinder salmon from passing through any fish pass.

These restrictions do not apply to any legal mill dam not having a crib box or cruive, or to any box, coop, apparatus, or net, or mode of fishing in connection with, or forming part of, the weir, for purposes of fishing; or to a weir which has attached to it a fish pass, approved of by the Home Office, through which there is a constant flow of water, such as will enable salmon to pass up and down it, until compensation for such right of fishery has been made by the conservators of the district to the owner of the fishery.² No ancient right or usage will justify fishing except with a rod within the prescribed distance of a dam in which there is no fish pass.³

No fixed engine of any description, including stake nets, bag nets, putts, putchers and nets fixed by anchor, or otherwise temporarily fixed to the soil, or other implement for taking fish, fixed to the soil, or made stationary in any other way, may be placed or used for catching salmon in any inland or tidal waters. These provisions are not to affect any ancient right or mode of fishing as *lawfully exercised* at the time of the passing of the Act, or during the five previous years—viz., 1857, 1858, 1859, 1860, 1861, by any person, by virtue of any grant or charter, or immemorial usage; but no person, by proving use of

Fixed engines.

¹ 24 & 25 Vict. c. 109, ss. 12, 23,

& 25 Vict. c. 109, s. 12.

² 36 & 37 Vict. c. 71, s. 17; 24

³ *Moulton v. Wilby*, 8 L. T., N. S. 284; 9 Jur., N. S. 472.

different engines during these years, will be allowed a number of privileged engines during these years, exceeding the greatest number in use during some one of the five years.¹

With regard to the meaning of the words "*lawfully exercised*," the question of course will be different in navigable and non-navigable rivers. In navigable rivers all weirs and fixed engines for catching fish are illegal, unless proved to have existed prior to the reign of Edward 1st;² whereas in non-navigable waters a right to erect such obstructions may be acquired by twenty years' uninterrupted enjoyment.³

What evidence necessary to establish a claim to use fixed engines in a navigable river.

In the case of *Holford v. George*,⁴ the owner of a several fishery in the navigable and tidal river Severn, claimed a right to use putchers and stop nets for the purpose of taking salmon, on the ground of immemorial user. He proved a user of forty-five years of some of the putchers, and of twenty years of the others; there was no evidence of previous user, nor was there any evidence to the contrary. The commissioners found the engines illegal. On a case stated for the Court of Queen's Bench, the Court held, that the user of forty-five years did not raise a conclusive presumption of law that the putchers and stop nets had been used from time immemorial, and were not of recent origin.

In the case of *Rawstorne v. Backhouse*,⁵ a claim was made by a lord of a manor to use reasonable fixed engines within the provisions of the Salmon Fishery Acts 24 & 25 *Vict. c. 109*; 28 & 29 *Vict. c. 121*. He proved the existence of a fishery in that part of the river from the earliest times, and gave evidence that before 1844 fixed engines had been used in various hollows formed in the sands of the river; that in 1844 a wall was built under an Act of Parliament to improve the navigation of the river, and through the building of the wall the bed of the river was changed, and

¹ 24 & 25 *Vict. c. 109*, ss. 4, 11; 28 & 29 *Vict. c. 121*, s. 39.

² See *ante*, p. 357.

³ See *ante*, p. 367.

⁴ L. R., 3 Q. B. 639; and see further as to evidence necessary to support such a claim, *ante*, p. 348 *et seq.*

⁵ L. R., 3 C. P. 67.

convenient hollows formed for placing the engines close to the wall. The engines claimed to be used were placed in these newly formed hollows in 1844, and had been used there ever since. In a case stated by the commissioners for the opinion of the Court, whether they were bound, as a matter of law, to find that the claimant was entitled to use the fixed engines; the Court held that it was a mixed question of fact and law, whether the using of the engines in places since 1844, different from those in which they had been used previously, amounted to an enhancement of the engines, and that the commissioners were not bound, as a matter of law, to find that the claimant was so entitled. "If," says Bovill, C. J., delivering the judgment of the Court, "during all living memory the enjoyment of the right claimed had been uniform, and unvarying, and consistent also with the ancient documents of title, we think the commissioners would have been bound to refer it to a legal origin, as by grant, charter, or immemorial usage, if possible, and to have presumed that the three baulks in question were legal and privileged engines within the meaning of the Salmon Fisheries Act. The difference in the situation of the baulks since 1844, however, at once introduces a difficulty in the way of the appellant, which is of more importance in these cases, because by the 41st sect. of the Act of 1865, the commissioners are bound to fix the situation, size and description of the engines which they are to certify as privileged. The use of the engines in the particular situations, where they have existed of late years, certainly could not be carried back earlier than the year 1844, and this, under the circumstances, would not be sufficient to found the presumption of a right to have them at those particular places; and if the right to have them in the situations where they existed previously to 1844 was relied upon, the appellant was met by the fact that they had not been so used in those places during the open season of either of the five years, 1857 to 1861, as required by the Act of 1865.

“In order to avoid these difficulties, the appellant’s counsel was driven to contend that the appellant had proved a right to have reasonable engines in reasonable places with reference to the changing of the bed of the river, and that the commissioners were bound to make a presumption, and to find accordingly in favour of such right. The utmost extent, however, to which that argument could, in our opinion, prevail, would be that the commissioners might be at liberty to presume such a right in the terms in which it was contended for by the appellant.”

What is a
“fixed engine.”

A stop net has been held to be a fixed engine within the definitions in these Acts. A stop net is used as follows:—The fisherman fixes his boat athwart the current of the river by lashing it at each end to a pole driven in the bed of the river. The net, which is thirty feet wide at the mouth, and tapers to a point, is stretched by two poles twenty-two-feet long, which are tied together at the upper end and kept extended (to the width of the net at the mouth) by a pole lashed across at about seven feet from the upper end. The net is lowered overboard until the two poles rest at about eight feet from the upper end on the side of the boat. The net and poles are thus nearly on a balance, and the fisherman presses slightly on the upper end and so keeps the net steady. At about an angle of twenty degrees he also holds a string attached to the bottom of the net, and when he feels the fish he presses down the upper ends of the poles with both hands, using the edge of the boat as a fulcrum, and so raises the net out of the water and catches the fish.¹

A net fixed to the bank by a stone, so as to give way on being touched by salmon and so entangle the fish, was held, in the case of *Thomas v. Jones*,² not to be a fixed engine within sect. 11 of 24 & 25 *Vict. c. 109*. To define with more certainty what the legislature meant by “fixed engine,” sect. 39 of 28 & 29 *Vict. c. 121*, was passed; and

¹ *Gore v. Commissioners of Fisheries*, L. R., 6 Q. B. 561.

² 5 B. & S. 916.

under this section a net temporarily fixed to a pole driven into the soil at one end, half the net being stretched across the channel and anchored to a buoy, and the other half, when the opportunity arrived, being rowed round to the stake so as to sweep the river, was held a fixed engine.¹

The mere using of a net fixed to the soil in tidal waters within the limits of a salmon fishery, but which net is not peculiarly an instrument for taking salmon, and is not fixed for that purpose, is not an offence within sect. 11 of 24 & 25 *Vict. c. 109*.²

No dam, except such fishing weirs and fishing mill dams as are lawfully in use in the year 1861, by virtue of grant, charter, or immemorial user, may be used for catching or facilitating the catching of salmon, under a penalty of 5*l.* for each offence, and a further penalty of 1*l.* for each fish, and the forfeiture of all contrivances used, and of all salmon caught. No fishing weir extending more than half-way across any stream at the lowest state of the water, although lawfully in use, may be used for catching salmon, unless it has a free gap as regulated by the Act; and no fishing mill dam may be so used unless it has attached to it a fish pass as approved by the Home Office. Any proprietor may, with consent of the Home Office, attach to a mill dam such a pass, provided no injury is done to the milling power.³

Privileged
weirs and
dams.

A mill dam built solely for milling purposes, and without any contrivances for catching fish, is not a fishing mill dam within sect. 4 of 24 & 25 *Vict. c. 109*, although it does, in fact, render it more easy to catch fish, and such dam cannot be abated under sect. 42 of 28 & 29 *Vict. c. 121*; but any person so catching fish is liable to the penalty imposed by sect. 12 of 24 & 25 *Vict. c. 109*.⁴

¹ *Olding v. Wild*, 14 L. T., N. S. 402.

² *Watts v. Lucas*, L. R., 6 Q. B. 226.

³ 24 & 25 *Vict. c. 109*, ss. 12, 23, 27.

⁴ *Garnett v. Backhouse*, L. R., 3

Q. B. 30. See *Rossiter v. Pike*, 4 Q. B. D. 24; *Pike v. Rossiter*, 37 L. T., N. S. 635; *Hodgson v. Little*, 14 C. B., N. S. 111; 32 L. J., M. C. 220; 16 C. B., N. S. 198; 33 L. J., M. C. 229.

It has been held in *Rolle v. Whyte*,¹ that the provisions making fish passes compulsory only relate to weirs reaching more than half-way across the stream, and that where there was a side stream fifteen feet wide, separated from the main stream by an island, this was not a stream within the Act so as to make a fish pass compulsory in a dam reaching across the side stream.

Trout and
other fresh-
water fish.

The provisions of the Fisheries Dynamite Act now, by the Fresh Water Fisheries Act,² extend to all fish in the United Kingdom, as does the 15th section of 36 & 37 *Vict. c. 71*, which prohibits obstruction of fish descending the stream.³ The provisions of 24 & 25 *Vict. c. 109, ss. 8 and 9*, which prohibit the use of otter laths, spears, &c., and the possession and use of roe for fishing, are now, by the same Act, extended to trout and char within the limits of the Act.⁴ That Act also provides for the establishment of fishery districts on trout and char rivers;⁵ and in such fishery districts empowers conservators to issue licences for fishing for trout and char, and incorporates the sections of the Salmon Fishery Acts imposing penalties on persons fishing without licence.⁶ With these exceptions there seem to be no general restrictions as to the mesh of nets which may be used, or the size of fish that may be taken.

Poaching fish.

It has been already stated, that at common law, irrespective of statute, the stealing of fish in any small pond, tank, or stew, which is private property, and where the fish may be taken at will by the owner at any time, is larceny, and punishable on indictment.⁷ In addition to this, by the Larceny Consolidation Act⁸ certain offences are created relating to the unlawful taking of fish in private fisheries. This statute enacts, that—Whosoever shall un-

¹ L. R., 3 Q. B. 286.

² 41 & 42 *Vict. c. 39, s. 12.* See p. 385.

³ Sect. 5.

⁴ *Ib.*

⁵ Sect. 6.

⁶ Sect. 7.

⁷ See *ante*, p. 369.

⁸ 24 & 25 *Vict. c. 96.*

lawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining¹ or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor,² punishable by the common law with fine and imprisonment in addition to or in lieu of sureties;³ and whosoever shall unlawfully or wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinafter mentioned, but which shall be private property, or in which there shall be any private right of fishery,⁴ shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money not exceeding 5*l.* as to the justice may seem meet: Provided that nothing hereinbefore contained shall extend to any persons angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit or pay any sum not exceeding 5*l.*, and if in any such water as last mentioned, he shall, on like conviction, forfeit and pay any sum not exceeding 2*l.* as to the justice may seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or in-

¹ The meaning of the word adjoining is defined as "*in actual contact, and not separated by a walk or fence.*" See *R. v. Hodges*, Moo. & M. 341.

² Sect. 24.

³ Sect. 117.

⁴ The statute has been held to apply to persons illegally fishing in a several fishery, in tidal waters as well as in private waters; *Paley v. Birch*, 8 B. & S. 336.

formation, or in any parish, township, or vill adjoining thereto.¹

The word "unlawfully" in this section means without any claim of right or title in the offender, such as can exist in law;² and if such claim appears to the justices to be set up *bonâ fide*, and with some show of reason, their jurisdiction in the case is ousted;³ and a *certiorari* may be obtained to quash any conviction they may have made;⁴ or the decision may be reviewed by a superior Court under 20 & 21 *Vict. c. 43*.⁵

An angler in the day time, that is, between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset, cannot be arrested; but a person angling at night, or fishing by other means than angling, may be arrested, and then without warrant by any person.⁶ The tackle of persons found fishing against the provisions of the Act, may be demanded, and, if refused, may be seized by the owner of the fishery, or his servant, or any person authorized by him. A person angling in the day-time, from whom any implement shall have been taken, is exempted from any further fine.⁷ Sect. 38 of *The Malicious Injuries Act*, 1861,⁸ enacts as follows: "Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, flood gate, or sluice of any fish pond, or of any water which shall be private property, or in which there shall be any private right of fishing, with intent to take or destroy any of the fish in such pond or water, or so as

¹ Sect. 24. The part of the shore between high and low water mark is within the adjoining county; and the justices of the county have jurisdiction over offences committed there, whether the land is covered or not with water; *Embleton v. Brown*, 30 L. T., N. S., M. C. 1; 3 E. & E. 234; *Reg. v. Musson*, 8 E. & B. 900; and see *ante*, Ch. I. p. 13.

² *Hudson v. McRae*, 5 B. & S. 485; *Hargreaves v. Diddams*, L. R.,

10 Q. B. 482.

³ *Reg. v. Peak*, 8 L. T., N. S. 536; *Leath v. Vinc*, 30 L. J., N. S., M. C. 207; *Cornwell v. Saunders*, 32 L. J., M. C. 6; *Reg. v. Burrow*, 34 Justice of Peace, 53.

⁴ *Reg. v. Stimson*, 4 B. & S. 301.

⁵ See *White v. Feast*, L. R., 7 Q. B. 353.

⁶ Sect. 103 (24 & 25 *Vict. c. 96*).

⁷ Sect. 25.

⁸ 24 & 25 *Vict. c. 97*.

“ thereby to cause the loss or destruction of any fish, or
“ shall unlawfully and maliciously put any lime, or other
“ noxious material, in any such pond or water, with intent
“ thereby to destroy any of the fish that may then be, or
“ that may hereafter be put therein, or shall unlawfully
“ or maliciously cut through, break down, or otherwise
“ destroy the dam or flood gate of any mill pond, or reser-
“ voir, or pool, shall be guilty of a misdemeanor : and being
“ convicted thereof, shall be liable, at the discretion of the
“ Court, to be kept in penal servitude for any term not
“ exceeding seven years, and not less than three years ; or
“ to be imprisoned, with or without hard labour, for any
“ term not exceeding two years, with or without hard
“ labour, and with or without solitary confinement ; and if
“ a male under the age of sixteen years, with or without
“ whipping.”

CHAPTER VII.

OF NAVIGATION, AND THEREIN OF CONSERVANCY.

The Right of Navigation.

Definition.

THE right of navigation is a right of way exercised for the purposes of trade and commerce, which may be enjoyed in the sea, in public and in private waters; and as such it includes all rights necessary for the full enjoyment and exercise of the rights of convenient passage, and of commerce, such as the right to pass, and to ground, and to anchor, to remain for a reasonable time for the purposes of loading and unloading, or for a wind.¹

The consideration of this right involves not only the discussion of the nature of the right itself, but also that of the rules governing its exercise. These, in the case of the sea, embrace (in addition to the mere rules of the road) matters of considerable extent and importance, such as the seaworthiness of vessels, the liability of ship owners, and the management of lighthouses, harbours, and ports, all of which are regulated by the merchant shipping laws, as well as the various questions arising in connection with the jurisdiction of the Court of Admiralty.²

It would be manifestly as impossible as inappropriate to attempt to treat this subject at all exhaustively in a Work like the present; but as, on the other hand, the Authors feel that it is equally unadvisable to omit all notice of it,

¹ *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Rex v. Russell*, 6 B. & C. 566; *Original Hartlepool Collieries v. Gibb*, 5 Ch. D. 713; *Dimes v. Petley*, 15 Q. B.

276; *Anon.*, Durham Assizes, 1808, per Wood, B.

² The reader is referred for a full consideration of these subjects to Maude & Pollock's Law of Merchant Shipping; Williams & Bruce's Admiralty Practice; and Boyd's Merchant Shipping Laws.

they have endeavoured to give in the present Chapter a brief general view of the law regarding navigation—

I. In the sea.

II. In inland waters.

*In the Sea.*¹

The sea is the necessary highway of all nations,² and the free navigation and commerce thereon is, therefore, the common right of all mankind.³ The sea is the highway of all nations.

The ships of all nations, whilst navigating the high seas,⁴ are subject only to the laws of their own country, and no one nation has the right to exercise civil or criminal jurisdiction over the ships of other nations during their passage between one foreign port and another.⁵ By 41 & 42 *Vict. c. 73*, foreigners on board foreign ships, passing within three nautical miles of the English coast, are made subject to English criminal law.⁶ The criminal jurisdiction over English ships on the high seas has, from the earliest times, been vested in the Court of Admiralty; and foreigners on board such ships are subject to English law.⁷ By 15 *Ric. II. c. 3*, it was provided, that the admiral should have no jurisdiction within the body of counties, either by sea or land, save for mayhem or murder done in estuaries and mouths of rivers, below the bridges where he should have a concurrent jurisdiction with the Courts of Jurisdiction over ships navigating.

¹ For the greater portion of this section, the authors have had recourse to Mr. A. C. Boyd's excellent work on *The Merchant Shipping Laws* (1876), to which the reader is referred for fuller particulars. Cf. also throughout Chapter I.

² Phillimore's *International Law*, vol. i. pp. 210, 211.

³ Wheaton's *International Law*, by Boyd, p. 251.

⁴ For definition of the high seas, and the limitations of territorial waters, see Chap. I. Territorial waters, as well as the high seas, are free to the peaceful naviga-

tion of foreign as well as English ships; *The Saxon*, 1 Lush. 410; cf. *Sir R. Phillimore*, 2 Ex. D. 82.

⁵ *Reg. v. Keyn*, 2 Ex. D. 217, per Kelly, C. B.; *The Vigilantia*, 1 C. Rob. 1; *The Vrou Anna Catharina*, 5 C. Rob. 161; *The Success*, 1 Dodd's Ad. 131.

⁶ See *ante*, Chap. I. p. 8; and the case of *Reg. v. Keyn*, *ante*, pp. 5—8.

⁷ *Reg. v. Sattler*, Dears. & B. Cr. C. 525; *Reg. v. Anderson*, L. R., 1 Cr. C. 161; *Reg. v. Lesley*, Bell, C. C. 220.

Common law. This jurisdiction of the admiral was transferred to the Central Criminal Court by 4 & 5 *Will. IV. c. 36*, and further changes have been made in the present reign as to the civil jurisdiction of the Admiralty Courts, which are thus stated by Mr. Boyd in "The Merchant Shipping Laws":¹—"By 3 & 4 *Vict. c. 65, s. 6*, "jurisdiction was given to the Admiralty Court to decide "all claims and demands whatsoever in the nature of "damage received by any ship or sea-going vessel, and to "enforce the payment thereof, whether such ship or vessel "may have been within the body of a county, or upon "the high seas, at the time when the damage was received, in respect of which such claim was made. And "The Admiralty Court Act, 1861 (24 *Vict. c. 10, s. 7*) "enacts in general terms, that the Court shall have jurisdiction over any claim for damage done by any ship. "The Court was therefore empowered to try any cause "whatsoever, of such a description, even if all the parties "to it were foreigners, and the cause of action arose out "of the jurisdiction. However, in deciding causes of the "latter kind, the Court must be guided by the rules of "law to which both parties were subject when the damage "was committed, and not by the Merchant Shipping "Acts."²

Pirates.

Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, may be lawfully captured on the high sea by the armed vessels of any particular State, and brought within its territorial jurisdiction for trial at its tribunals.³

Tolls.

No tolls are demandable from vessels navigating the

¹ Page 262. See also for the origin and jurisdiction of the Admiralty Court, Williams' & Bruce's Admiralty Practice.

² "It is a general rule in construing Acts of Parliament, that the legislature must be presumed to have intended by its enactments to regulate the rights

"which should subsist between its own subjects, and not to affect the rights of foreigners, unless the contrary be expressed or implied from the absolute necessity of the case;" Boyd, Merchant Shipping Laws, p. 262.

³ Wheaton, International Law, p. 168, and *ante*, Chap. I.

sea, save such as are chargeable for the formation of harbours, and the maintenance of buoys, lights, and beacons, which are a good consideration for a toll;¹—"It being required," says Hale, "that any man who will prescribe for a toll on the sea must allege a good consideration."² Hence no tolls can be taken for anchorage save in a port or harbour.³

The main ocean is incapable of being the property of any one State; but a nation may acquire exclusive right of navigation therein as against another nation by virtue of the specific provisions of a treaty,⁴ or by the tacit acquiescence of such other nation in its appropriation of certain portions for navigation.⁵ Similarly, though the soil of the bed of the sea cannot be the exclusive property of one nation, the beneficial occupation thereof for a sufficient time by any one nation may give a prescriptive right to such portion by the tacit consent of other nations; for the uninterrupted possession of territory or other property for a certain time by a State excludes the claim of every other.⁶ Also, when the sea or the bed thereof can be physically occupied permanently by erections, it may be the subject of occupation; and hence, piers, harbours and breakwaters become, in such cases, permissible, and, being for the benefit of navigation, are readily acquiesced in.⁷

A harbour or haven is a place naturally or artificially made for the safe riding of ships.⁸ A port is a haven, and something more,—it is a harbour where customs officers are established, and where goods are either imported or exported to foreign countries,⁹ and comprehends

Ports and
harbours.

¹ Hale de Portibus Maris, Harg. Tr. 51; *Gann v. Free Fishers of Whitstable*, 11 H. L. 193.

² 1 Mod. 105.

³ *Gann v. Free Fishers of Whitstable*, *supra*. See on this subject, ante, Chap. I. p. 45, and *post*, Chap. IX.

⁴ Phillimore, International Law, vol. 1, pp. 210, 211.

⁵ Vattel, Droit des Gens, t. 1, c. xxiii.

⁶ Wheaton's International Law, by Boyd, p. 220.

⁷ Cockburn, C. J., *Reg. v. Keyn*, 2 Ex. D. 198.

⁸ Hale de Portibus Maris, c. 2.

⁹ Houck's Navigable Rivers, p. 175.

a city or borough, called *caput portus*, with a market and accommodation for sailors.¹

In virtue of its prerogative, the Crown is conservator of all ports and havens, creeks and arms of the sea, and protector of the navigation thereof,² and may grant to a subject the right to erect a port on his own land or on the land of another, provided, in the latter case, no vested interests are interfered with.³ The ports of this country are now, however, almost exclusively the property of corporate bodies by ancient grant or charter from the Crown, or by Act of Parliament, by which the powers and duties of the trustees and the public in each particular port are regulated. 10 & 11 *Vict. c. 27* (*The Harbours, Docks, and Piers Clauses Act*, 1847), consolidated the provisions usually embodied in local Acts for the construction of harbours and piers; and by 24 & 25 *Vict. c. 45*, the Board of Trade may make provisional orders authorizing the erection of such works; while 25 & 26 *Vict. c. 69* transferred to that body various duties and powers relative to harbours and navigation which were formerly vested in the Admiralty.

The Public Works Loan Commissioners are authorized by sect. 9, Schedule 1, of 38 & 39 *Vict. c. 89*,⁴ to make loans to any person authorized, for the purpose of the construction and improvement of docks, harbours, and piers, under *The Harbours and Passing Tolls Act*, 1861.⁵

By 40 & 41 *Vict. c. 16*,⁶ s. 4, harbour and conservancy

¹ Hale, c. 11. For the law relating to ports and harbours, see further *ante*, Chap. I.

² Hale de Jure Maris, Harg. Tr. 23.

³ *Mayor of Exeter v. Warren*, 5 Q. B. 773.

⁴ The Public Works Loans Act.

⁵ 24 & 25 *Vict. c. 47*.

⁶ "An Act to facilitate the removal of Wrecks obstructing Navigation." By sect. 3, "Harbour" includes harbours pro-

"perly so called, whether natural or artificial, and estuaries, navigable rivers, piers, jetties, and other works, in or at which, ships can obtain shelter, or ship and unship goods or passengers; and 'tidal water' means any part of the sea and any part of a river within the ebb and flow of the tide at ordinary spring tides, and not being a harbour.

"'Harbour authority' includes all persons or bodies of persons,

authorities are empowered to remove vessels sunk, stranded, or abandoned in tidal waters or harbours, where such wreck is or is likely to become an obstruction to navigation, or to destroy and, under certain conditions, to sell such wreck, and thereout defray expenses incurred under the Act. By sect. 5, similar powers are given to general lighthouse authorities. Where questions arise between these various authorities as to their powers under the Act, the Board of Trade is authorized to determine them (sect. 7).

The regulations respecting the ownership, measurement, and registry of British ships;¹ the law governing the liability of shipowners,² the relation between masters and seamen,³ and the procedure with regard to wrecks, casualties, and salvage;⁴ as well as the rules for preventing accidents in navigation,⁵ for the management of lighthouses,⁶ for the appointment and supervision of pilots,⁷ and for the administration of the Mercantile Marine Fund,⁸ are all under the direction of the Board of Trade, and are provided for by *The Merchant Shipping Acts, 1854 to 1876*.⁹

The Merchant Shipping Acts.

“corporate or unincorporate, being proprietors of or intrusted with the duty, or invested with the power of constructing, improving, managing, regulating, maintaining or lighting a harbour; and ‘conservancy authority’ includes all persons or bodies of persons, corporate or unincorporate, intrusted with the duty and invested with the power of conserving, maintaining or improving the navigation of a tidal water; while ‘general lighthouse

“‘authority’ has the same meaning as the term has in the Merchant Shipping Act, 1854.”

¹ 17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854), Part II.

² *Ib.*, Part IX.

³ *Ib.*, Part III.

⁴ *Ib.*, Part VIII.

⁵ *Ib.*, Part IV.

⁶ *Ib.*, Part VI.

⁷ *Ib.*, Part V.

⁸ *Ib.*, Part VII. See *The Merchant Shipping Laws* (A. C. Boyd) (1876), p. 9.

⁹ The following are the Merchant Shipping Acts, 1854—1876:

17 & 18 Vict. c. 104 (Merc. Shipping Act, 1854).

17 & 18 Vict. c. 120 („ „ „ Repeal Act, 1854).

18 & 19 Vict. c. 91 („ „ „ Amendment Act, 1855).

25 & 26 Vict. c. 63 („ „ „ „ „ 1862).

30 & 31 Vict. c. 124 („ „ „ „ 1854, Amendment Act, 1867).

31 & 32 Vict. c. 129 (Colonial Shipping Act, 1868).

32 Vict. c. 11 (Merchant Shipping (Colonial) Act, 1869).

34 & 35 Vict. c. 110 (Merchant Shipping Act, 1871).

35 & 36 Vict. c. 73 („ „ „ „ 1872).

36 & 37 Vict. c. 85 („ „ „ „ 1873).

39 & 40 Vict. c. 80 („ „ „ „ 1876).

See for a full consideration of this branch of the law, Maude & Pollock's *Law of Merchant Shipping*, Williams & Bruce's *Admiralty Practice*, and *Merchant Shipping Laws* (A. C. Boyd) (1876).

17 & 18 Vict.
c. 104, and
39 & 40 Vict.
c. 80.

Of these the two most important are 17 & 18 *Vict. c. 104* (*The Merchant Shipping Act, 1854*), and 39 & 40 *Vict. c. 80* (*The Merchant Shipping Act, 1876*), and it is enacted by sect. 2 of the latter Act that it shall be construed as one with *The Merchant Shipping Act, 1854*, and the Acts amending the same, and the said Acts and this Act may be cited collectively as *The Merchant Shipping Acts, 1854 to 1876*.¹

17 & 18 Vict.
c. 104.

The Act of 1854, which is the principal Act, is divided into eleven parts (sect. 5), eight of which treat of the various matters noticed above,² while of the remaining three the *first* relates to the general functions of the Board of Trade, the *tenth* to legal procedure, and the eleventh to miscellaneous matters.

By sect. 6 of Part I. the Board of Trade is constituted “the department to undertake the superintendence of matters relating to merchant ships and seamen, and carry into execution this and all other Acts in force and relating to the subject other than such Acts as relate to the revenue.”

Part IV. of the Act relates to “safety and the prevention of accidents,” and is stated by sect. 291 to apply “to all “British ships; and all foreign steamships carrying passengers between places in the United Kingdom shall be “subject to all the provisions with respect to the certificates “of the masters and mates thereof to which British ships “are subject.”

Regulations
for navigation,
sect. 25
of 25 & 26
Vict. c. 63.

The regulations for navigation on the high seas are contained in sect. 25 of 25 & 26 *Vict. c. 63* (*The Merchant Shipping Act Amendment Act, 1862*), which enacts that,—
“On and after the 1st day of July, 1863, or such later
“day as may be fixed for the purpose by order in council,
“the regulations in the table marked (C) in the schedule
“hereto shall come into operation and be of the same force
“as if they were enacted in the body of this Act; but Her

¹ Boyd's Merchant Shipping
Laws, *passim*.

² See p. 401, *ante*, and notes
(¹)—(⁸).

“Majesty may from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by order in council, annul or modify any of the said regulations, or make new regulations in addition thereto, or in substitution therefor, and any alterations in or additions to such regulations made in the manner aforesaid shall be of the same force as the regulations in the said schedule.”¹

¹ The following are the rules made by an order in council of 14th August, 1879, and which are to be substituted for the rules formerly in force, on and after the 1st of September, 1880:—

FIRST SCHEDULE.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

Preliminary.

ART. 1. In the following rules every steam ship which is under sail and not under steam is to be considered a sailing ship; and every steam ship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights.

ART. 2. The lights mentioned in the following Articles, numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers, from sunset to sunrise.

ART. 3. A seagoing steam ship when under way shall carry:

(a) On or in front of the foremast, at a height above the hull of not less than twenty feet, and if the breadth of the ship exceeds twenty feet then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass; so fixed as to throw the light ten points on each side of the ship, viz. from right ahead to two points abaft the beam on either side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles:

(b) On the starboard side, a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light

from right ahead to two points abaft the beam on the starboard side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles:

(c) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the port side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles:

(d) The said green and red side lights shall be fitted with in-board screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

ART. 4. A steam ship, when towing another ship shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, so as to distinguish her from other steam ships. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steam ships are required to carry.

ART. 5. A ship, whether a steam ship or a sailing ship, when employed either in laying or in picking up a telegraph cable, or which from any accident is not under command, shall at night carry in the same position as the white light which steam ships are required to carry, and, if a steam ship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line one over the other, not less than three feet apart: and shall

25 & 26 Vict.
c. 63.
Publication

By s. 26 of 25 & 26 *Vict. c. 63*, it is enacted that the Board of Trade shall cause these regulations and altera-

by day carry in a vertical line one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

These shapes and lights are to be taken by approaching ships as signals that the ship using them is not under command, and cannot therefore get out of the way.

The above ships, when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

ART. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steam ship under way, with the exception of the white light, which she shall never carry.

ART. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for use: and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

ART. 8. A ship, whether a steam ship or a sailing ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon, at a distance of at least one mile.

ART. 9. A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the mast head, visible all round the horizon,

and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships.

ART. 10. (a) Open fishing boats and other open boats when under way shall not be obliged to carry the side lights required for other vessels; but every such boat shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

(b) A fishing vessel, and an open boat, when at anchor, shall exhibit a bright white light.

(c) A fishing vessel, when employed in drift net fishing, shall carry on one of her masts two red lights in a vertical line one over the other, not less than three feet apart.

(d) A trawler at work shall carry on one of her masts two lights in a vertical line one over the other, not less than three feet apart, the upper light red, and the lower green, and shall also either carry the side lights required for other vessels, or, if the side lights cannot be carried, have ready at hand the coloured lights as provided in Article 7, or a lantern with a red and a green glass as described in paragraph (a) of this Article.

(e) Fishing vessels and open boats shall not be prevented from using a flare-up in addition, if they desire to do so.

(f) The lights mentioned in this Article are substituted for those mentioned in the 12th, 13th, and 14th Articles of the Convention between France and England scheduled to the British Sea Fisheries Act, 1868.

(g) All lights required by this Article, except side lights, shall be in globular lanterns so constructed as to show all round the horizon.

ART. 11. A ship which is being

tions of them to be published, and that the Gazette containing them shall be evidence; and sect. 27 provides and enforcement of regulations.

overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

Sound Signals for Fog, &c.

ART. 12. A steam ship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog horn to be sounded by a bellows or other mechanical means, and also with an efficient bell. A sailing ship shall be provided with a similar fog horn and bell.

In fog, mist, or falling snow, whether by day or night, the signals described in this Article shall be used as follows; that is to say,

- (a) A steam ship under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.
- (b) A sailing ship under way shall make with her fog horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.
- (c) A steam ship and a sailing ship when not under way shall, at intervals of not more than two minutes, ring the bell.

Speed of Ships to be moderate in Fog, &c.

ART. 13. Every ship, whether a sailing ship or steam ship, shall in a fog, mist, or falling snow, go at a moderate speed.

Steering and Sailing Rules.

ART. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz. :—

- (a) A ship which is running free shall keep out of the way of a ship which is close-hauled.
- (b) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.
- (c) When both are running free with the wind on different

sides, the ship which has the wind on the port side shall keep out of the way of the other.

- (d) When both are running free with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.
- (e) A ship which has the wind aft shall keep out of the way of the other ship.

ART. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This Article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each ship is in such a position as to see both the side lights of the other.

It does not apply by day, to cases in which a ship sees another ahead crossing her own course; or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

ART. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

that all owners and masters shall be bound to obey them so long as they continue in force; breaches thereof being deemed to imply wilful default on the part of persons in charge of vessels whenever any damage arises through their non-observance (sect. 28).¹ Sect. 30 provides for the enforcement of the regulations by means of surveyors empowered to inspect vessels, and to point out to masters and owners any deficiencies, and the mode of meeting the same, and to grant certificates that vessels are properly

ART. 17. If two ships, one of which is a sailing ship, and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship.

ART. 18. Every steam ship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

ART. 19. In taking any course authorized or required by these regulations, a steam ship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz.:—

One short blast to mean "I am directing my course to star-board."

Two short blasts to mean "I am directing my course to port."

Three short blasts to mean "I am going full speed astern."

The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made.

ART. 20. Notwithstanding anything contained in any preceding Article, every ship, whether a sailing ship or a steam ship, overtaking any other, shall keep out of the way of the overtaken ship.

ART. 21. In narrow channels every steam ship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship.

ART. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

ART. 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a depart-

ture from the above rules necessary in order to avoid immediate danger.

No Ship, under any Circumstances, to neglect proper Precautions.

ART. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

ART. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland navigation.

Special Lights for Squadrons and Convoys.

ART. 26. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal lights for two or more ships of war or for ships sailing under convoy.

SECOND SCHEDULE.

FOREIGN COUNTRIES WHICH HAVE ADOPTED THE ABOVE RULES.

Austria-Hungary.	Italy.
Belgium.	Netherlands.
Chili.	Norway.
Denmark.	Portugal.
France.	Russia.
Germany.	Spain.
Great Britain.	Sweden.
Greece.	United States.

¹ Boyd's Merchant Shipping Laws, p. 278.

provided with lights, and the means of making signals in pursuance of the regulations, it being enacted that no collectors of customs at any port shall clear any ship outwards without such certificate.

In the case of collisions, it is provided by sect. 17 of *Collisions*. 36 & 37 Vict. c. 85, that the ship infringing any of the regulations for preventing collisions contained in or made in *The Merchant Shipping Acts*, 1854—1873, shall be deemed to be in fault unless it can be shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.¹ 36 & 37 Vict. c. 85.

¹ The duties of masters of vessels in case of collisions are regulated by sect. 16 of 36 & 37 Vict. c. 85. It may be useful to note here some of the main points of the law on this subject as stated by Mr. Boyd (*Merchant Shipping Laws*, pp. 258, 262):—

Collisions.—Ships are held liable for damage occasioned by collision, either on account of the culpable neglect or complicity, direct or indirect, of their owners, or on account of the negligence, unskillfulness or carelessness of those employed in their control and navigation. When employed in navigation ships must be kept seaworthy and be well manned and equipped for the voyage, and where this is not done and a collision ensues between such ship and one without fault in that respect, the owners of the deficient vessel cannot escape responsibility if the deficiency caused or contributed to the disaster. (*The Continental*, 14 Wallace, Amer. Rep. 354; *The Glannabanta*, 1 P. D., C. A. 291.)

“There are four possibilities,” said Lord Stowell in the *Woodrop Sims* (2 Dods. Ad. 85), “under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to

“light; the other not being responsible to him in any degree. “Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or skill on both sides. In such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. “Thirdly, it may happen by the misconduct of the suffering party only, and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to an entire compensation from the other.”

The Court of Admiralty and the common law Courts used formerly to be guided by different rules for damages when both ships were in fault. But it is now enacted, that “in any case or proceeding for damages arising out of a collision between two ships, if both ships shall be found to be in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail” (*The Judicature Act*, 1873, 36 & 37 Vict. c. 66, s. 25, sub-s. 9).

“Most countries,” says Mr. Boyd (*Merchant Shipping Laws*, pp. 258—260), “possessing any

Pilots and
pilotage.
17 & 18 Vict.
c. 104.

The law relating to pilotage is governed by Part V. of
17 & 18 Vict. c. 104 (*The Merchant Shipping Act, 1854*).

“considerable mercantile marine,
“have now adopted the same rules
“of navigation, and when the case
“is one within the rules there will
“be no difficulty in determining
“by what law it is to be decided.
“But it may happen that the case
“is one not contemplated in the
“rules, or that the foreign vessel
“is one not bound by them.

“The general rule respecting all
“remedies seems well settled ‘that
“‘whatever relates to the remedy
“‘to be enforced, must be deter-
“‘mined by the *lex fori*, the law
“‘of the country to the tribunals
“‘of which the appeal is made’
“‘(per Lord Brougham in *Don v.*
“‘*Lippmann*, 5 Cl. & F. 13; *British*
“‘*Linen Co. v. Drummond*, 10 B. &
“‘C. 903; *De la Vega v. Viana*, 1
“‘B. & Ad. 284). But in regard
“to the rights and merits in-
“volved in actions, the law of the
“place where they originated is
“to govern (Story, on the Conflict
“of Laws, s. 588). ‘The civil lia-
“‘bility,’ said Willes, J., in a
“recent case (*Phillips v. Eyre*, L.
“R., 6 Q. B. 28), ‘arising out
“‘of a wrong derives its birth
“‘from the law of the place, and
“‘its character is determined by
“‘that law.’ But in order that
“a wrong committed abroad should
“give a remedy in England, it is
“essential that the wrong should
“be of such a character, that it
“would have given a cause of
“action if committed in England
“(*The Halley*, L. R., 2 P. C. 194;
“*Smith v. Condry*, 1 Howard
“*(Amer. Rep.)* 28). Lord J.
“Mellish recently said, ‘The law
“‘respecting personal injuries
“‘and respecting wrongs to per-
“‘sonal property appears to me
“‘to be perfectly settled, that no
“‘action can be maintained in the
“‘Courts of this country on ac-
“‘count of a wrongful act, either
“‘to a person or to personal pro-
“‘perty committed within the
“‘jurisdiction of a foreign country,
“‘unless the act is wrongful by

“‘the law of the country where it
“‘is committed, and also wrongful
“‘by the law of this country’
“(*The M. Moxham*, 1 P. D. (C.
“A.) 111; *Phillips v. Eyre*, L. R.,
“6 Q. B. 28).

“Thus, an English ship was
“compelled to take a pilot on
“board off Flushing, and through
“the negligence of the pilot a
“collision occurred. By the Bel-
“gian law the owners, though
“compelled to employ a pilot, are
“liable for his acts, whereas in
“England, when pilotage is com-
“pulsory, the pilot alone is re-
“sponsible. In a cause of collision
“instituted against the British
“ship in this country, it was held
“that the party claiming repara-
“tion in a British Court was not
“entitled to the benefit of the
“foreign law that made the owner
“responsible against the provisions
“of English statute law, by which
“no such liability as provided by
“the Belgian law existed. An
“English Court will not enforce a
“foreign municipal law, and give a
“remedy in the shape of damages
“in respect of an act which, ac-
“cording to its own principles,
“imposes no liability on the per-
“son from whom the damages are
“claimed (*The Halley*, L. R., 2
“P. C. 194; *Smith v. Condry*, 1
“Howard *(Amer. Rep.)* 28).
“And on the other hand, where a
“cause of damage was instituted
“in this country against an Eng-
“lish ship for damaging a pier in
“Spain, and it was alleged that
“by the law of Spain the owner
“of the ship was not responsible
“for such an act of the master, it
“was held, that if the owner was
“not responsible in Spain he could
“not be made so in England, even
“though he would have been
“liable had the damage been com-
“mitted in England (*The M.*
“*Moxham*, 1 P. D. (C. A.) 107).

“The same principles apply to
“torts committed on the high
“seas. No liability will attach

It is enacted by sect. 353, that, "Subject to any alteration to be made by any pilotage authority, in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory, immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts, shall also continue in force; and every master of any unexempted ship navigating within any such district, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, employs or continues to employ an unqualified pilot to pilot her, shall, for every such offence, incur a penalty of double the amount of pilotage demandable for the conduct of such ship."

The exemptions referred to in the first part of the section are contained in 6 *Geo. IV. c. 125*, and still continue in force, though that Act is repealed by 17 & 18 *Vict. c. 120*.

Exemptions.
6 *Geo. IV.*
c. 125, and
17 & 18 *Vict.*
c. 120.

"A pilot is defined by sect. 2 to be any person not belonging to a ship, who has the conduct thereof; and a 'qualified pilot' shall mean any person duly licensed by

Definition of
"pilot" and
"qualified
pilot."

"in this country unless the act gives a remedy by English law, and also by the laws of the sea in force at the place where it was committed (*Williams v. Gutch (The Chancellor)*, 14 Moo. P. C. 202). When the case does not fall within the rules, or the foreigner is not bound by them, and the British ship is in the

"wrong according to British law, but in the right by the maritime law of the locality, she will then be free from liability, since, as the foreigner could not himself be bound by British law, he cannot avail himself of the fact that the British ship has violated that law (*The Zollverein*, Swa. 96; *The Saxonia*, Lush. 410)."

Sect. 2 of
17 & 18 Vict.
c. 104.

"any pilotage authority to conduct ships to which he does not belong. He is excepted from the definition of a seaman. A pilot supersedes the master, and the master is bound to obey his directions in the management of the vessel. (*The Julia*, Lush, P. C. 232.) If the master acts in any way contrary to the opinion of the pilot, he will be responsible for any damage that may occur by reason of such acts, notwithstanding that the pilot has charge of the ship. (*The Julia*, Lush, P. C. 232; 14 Moo. P. C. 210.)"¹

"Pilotage authority" is defined by the same section (sect. 2), to include all bodies and persons authorized to appoint or license pilots, or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage. The powers of such pilotage authorities are defined in sects. 331—339; the regulations as to pilot boats in sects. 345—348; and those as to pilot licences in sects. 349—352.

Sect. 368 of
17 & 18 Vict.
c. 104.

The Trinity
House.

By sect. 368, "The Trinity House may, in exercise of the general power hereinbefore given to all pilotage authorities, of doing certain things in relation to pilotage matters, alter such of the provisions hereinafter contained as are expressed to be subject to alteration by them, in the same manner and to the same extent as they might have altered the same, if such provisions had been contained in any previous Act of Parliament, instead of this Act;" and their powers in this respect are set forth in sects. 369—386.²

Lighthouses,
buoys, and
beacons.

Part VI. of
17 & 18 Vict.

Part VI. of 17 & 18 Vict. c. 104 (*Merchant Shipping Act*, 1854), regulates the management of lighthouses.

By sect. 389, the care of lighthouses, buoys, and

¹ Boyd, *Merchant Shipping Laws*, p. 301, and cf. p. 4, and pp. 303—314; and see Maude & Pollock, Chap. V. p. 176.

² Boyd, *Merchant Shipping Laws*, pp. 329—341. For regula-

tions concerning Cinque port pilots see pp. 341—344, and for those with respect to the Trinity Houses of Hull and Newcastle, see p. 344.

beacons, is vested in the Trinity House, as regards England and Wales, the islands of Jersey, Guernsey, Sark, and Alderney, and the adjacent seas and islands, as well as in Heligoland and Gibraltar. With respect to Scotland, and the adjacent seas and islands, and the isle of Man, it is placed under the control of the Commissioners of Northern Lighthouses; and in Ireland, and the adjacent seas and islands, under that of the Commissioners of Irish Lights. "Subject to the provisions hereinafter contained, the said Trinity House, and Commissioners (hereinafter termed General Lighthouse Authorities), shall respectively continue to hold and maintain all property now vested in them in that behalf, in the same manner and for the same purposes as they have hitherto held and maintained the same."¹

The construction of, and the dues for, new lighthouses, are governed by sects. 404—412 of *The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c. 104*),² and Colonial lighthouses and dues by 18 & 19 *Vict. c. 91* (sects. 2—8).³

The rights and obligations of passengers are set forth in *The Passengers Acts*, 1855 and 1870.⁴

In Inland Waters.

By sect. 31 of 25 & 26 *Vict. c. 63*,⁵ it is provided that any rules under *local Acts* concerning the lights or signals to be carried by vessels navigating the waters of any harbour, river, or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels,

¹ The Commissioners of Northern Lights are defined by sect. 390. The Commissioners of Irish Lights were formerly termed the Port of Dublin Corporation, which was divided into two separate corporations by sect. 2 of 30 *Vict. c. 81* (*The Dublin Port Act*, 1876) (local and personal). See Boyd, pp. 3, 346.

² Boyd, *Merchant Shipping Laws*, pp. 354—358.

³ *Ib.* pp. 352—354.

⁴ *Ib.* p. 471 et seq. The acts are:—18 & 19 *Vict. c. 119* (*Passengers Act*, 1855); 26 & 27 *Vict. c. 51* (*Passengers Act Amendment Act*, 1863); 33 & 34 *Vict. c. 95* (*Passengers Act Amendment Act*, 1870). See Maude & Pollock, Chap. XI. p. 446.

⁵ *The Merchant Shipping Act Amendment Act*, 1862.

c. 104, s. 389.
The Trinity House.

The Commissioners of Northern Lighthouses.

The Commissioners of Irish Lights.

New lighthouses.

Colonial lighthouses.

The Passengers Acts.

Sect. 31 of 25 & 26 *Vict. c. 63*, general enactment as to lights, signals, &c. to be used in inland navigation.

are to continue in force; but in the case of harbours and rivers where no such rules exist, it shall be lawful for her Majesty in council, upon application from the harbour trust or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation, or, if there is no such harbour trust or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters; and such rules when so made shall, so far as regards vessels navigating such waters, have the same effect as if they were regulations contained in Table (C) in the schedule to this Act, notwithstanding anything in this Act or in the schedule thereto contained.¹

A consideration of the above general enactment will show that the rules regarding inland navigation must necessarily be of a more heterogeneous and complex nature than those controlling the navigation of the sea, owing to the fact that the former are established for the most part by a variety of private bodies.

In addition to this, it is to be noted that the right of navigation on inland waters is also of a more complicated kind than that of navigation upon the sea, not only on account of the different classes of inland waters, but also from the restricted extent of the water-way available for navigation, and the consequent collision in many cases of the public right with the rights of private individuals. Lastly, it must be pointed out that the preservation of the navigation of inland waters and its regulation, both of which are now included under the term "*conservancy*," are governed almost entirely by statute law, and may be clearly distinguished from the general *common law right to navigate* upon such waters.

¹ Boyd, Merchant Shipping Laws, pp. 282, 283. For the rules in Table C. see *ante*, p. 403 *et seq.*, and for the rules of the Thames, see Order in Council of 5th February, 1872, and *post*, Appendix.

For these reasons it has been considered advisable to treat of the subject as follows:—

1. *The general Right of Navigation, its Nature, Extent, and the Injuries thereto.*
 - (a.) In tidal waters.
 - (b.) In private waters.
2. *The Conservancy of Navigation and the Powers and Duties of Conservators.*

The bed of all navigable rivers, where the tide flows and re-flows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm.¹

The general right of navigation in tidal waters.

These are two totally distinct and different things; the one is the right of property, and the other the right of navigation. The right of navigation is simply a right of way. The public, who have the right to navigate on an inland water, have no right of property therein.²

Although the flux and reflux of the tide is *prima facie* evidence that a river is navigable, it does not necessarily follow that because the tide flows and reflows in any particular place, that it is therefore a public navigation although of sufficient size. The strength of the evidence arising from the flux and reflux of the tide must depend on the situation and nature of the channel. If it is a broad and deep channel, calculated to serve for the purposes of commerce, it will be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain states of the tide, and then only for a short time and by very small boats,³ it is difficult to suppose that

Extends to all tidal waters which are navigable at any state of the tide.

¹ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

² *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Abraham v. Great Northern Rail. Co.*, 16 Q. B. 596, per Patteson, J.

³ For definition of "navigable river," according to French law, as existing in Canada, see *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.), and for distinction between "navigable" and "boat-

it has ever been a public navigable river.¹ The actual user of a tidal river for the purposes of navigation is of course the strongest evidence of its navigability.²

Where, therefore, a river ceases to be navigable, either from natural causes, such as the recess of the sea, or the accumulation of soil or mud in the channel, the river will cease to be navigable, at any rate till such obstruction be by some means counteracted.³

*Mayor of
Colchester v.
Brooke.*

In the case of *Mayor of Colchester v. Brooke*, Lord Denman, C. J., delivering the judgment of the Court, fully states the law on this point—"The evidence showed "this to be a tidal river, and, in the part in question, so "shallow in certain states of the tide, that the vessel could "not float there, but necessarily grounded. The plaintiffs "contended that a right to navigate, pass and repass, was "merely a right to float along; and that the facts showed "that in this part of the river such a right could not "exist at all times of the tide. The learned judge stated "that a navigable river was so at all times; that a subject "might go upwards and downwards, though he might not "be able to reach the port or the deep water in one tide, "or without grounding; and that even if such grounding "subjected him to compensate for injury done, that did "not affect the nature of the right in respect to time of "enjoyment. We are of opinion that he was justified "fully in so stating the law. No authority directly in "point was stated at the bar; nor have we been able to "find any after considerable search; but upon principle "the matter seems clear. It cannot be disputed, that the "channel of a public navigable river is properly described "as a common highway, although the analogy between it "and a highway on land is not complete in all particulars: "and there is no one circumstance which more decisively

able" in American law, see Angell on Watercourses, ch. 13.

¹ *Rex v. Montague*, 4 B. & C. 598; *Mayor of Lynn v. Turner*, 1 Cowp. 36.

² *Miles v. Rose*, 5 Taunt. 705; and per Bayley, J., in *Vooght v. Winch*, 2 B. & Ald. 662.

³ *Rex v. Montague*, 4 B. & C. 598; *Reg. v. Betts*, 16 C. B. 1022.

“ affixes on a river the character of being public and
“ navigable in this sense of a highway, than the flow and
“ reflow of the tide in it. Now, if in such rivers it was
“ held, that the character did not extend higher up than
“ the water sufficed to float vessels at all times, or was
“ suspended during such periods of the tide as left the
“ channel too shallow for that purpose,—rights of the
“ public, invaluable and immemorial, in numerous rivers,
“ would be abridged, or rendered in many particulars
“ vexatiously uncertain, and in many cases be made
“ nearly, if not entirely, useless. The present case is
“ an illustration of this. Upon the evidence it ap-
“ peared that vessels of a burthen which usually traded to
“ Colchester, could not, except at spring tides, go up to the
“ town in one tide. To say then that the river ceased to
“ be navigable, ceased to be a highway, at the ebb or
“ other states of the tide, when such vessels could not float,
“ is in effect to say that, except for a short period of every
“ month, they should not use the river at all for the
“ purpose of trading with Colchester. It is more reason-
“ able to hold that the term ‘navigable’ is a relative and
“ comprehensive term, containing within it all such rights
“ upon the waterway as, with relation to the circumstances
“ of each river, are necessary for the full and convenient
“ passage of vessels and boats along the channel. Nor
“ will this be repugnant to any legal principle applicable
“ to the case. It does not interfere with the rights of
“ individuals on the banks (see *Ball v. Herbert*¹), but
“ stands on this broad ground: The right of soil in arms
“ of the sea and public navigable rivers, which the Crown
“ *primâ facie* has independently of any ownership in the
“ adjoining lands, must in all cases be considered as
“ subject to the public right of passage, however acquired;
“ and any grantee of the Crown must of course take
“ subject to such right. Nor is this inconsistent with a

¹ 3 T. R. 253.

“permanent loss of such right, if, by accumulation of silt or any other natural cause, the channel becomes choked up (*Rex v. Montague*¹). The law has made no provision for the clearing of such a highway, and, in such case, the river ceases to be navigable, at least until such causes are by some means counteracted. In this large sense, and with this large exception, the river is navigable, and is a highway at all times and all states of the tide; in any other sense the public right may become all but valueless.”

Change of course of a river does not destroy the right.

Where a navigable river changes its channels, although the soil of the bed and the right of fishing may be vested in the owner of the adjoining land, so as to bar the right of the Crown to the bed, and of the public to the fishery; it would appear that the right of navigation will follow to the new channel,² the test being whether the river remains tidal.³

So, where a river was formerly navigable but became silted up, and by Act of Parliament power was given to commissioners to restore the navigation, and they were authorized to make, and made, a new cut, the navigation of the same to be open on payment of tolls, it was held that the cut was a public navigable river, the obstruction of which was an indictable nuisance, and that the public had the same rights over it as they had over the original stream.⁴

The right is a paramount right to pass and anchor free of toll.

The right of navigation in public waters is a paramount right in all subjects of the realm to pass and to ground and to anchor at pleasure, free from toll,⁵ at all times and states of the tide,⁶ and in all species of vessels,⁷ independently of any usage or prescription to that effect. It is a right of free passage over the whole of the navigable

¹ 4 B. & C. 598.

² *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 366, ante, Ch. II. p. 62, and Ch. VI. p. 347.

³ *Hale de Jure Maris*, p. 1, c. 6, p. 34; 1 Roll. Abr. 390; Roscoe on Crim. Evidence, 6th ed. p. 535.

⁴ *Reg. v. Betts*, 16 Q. B. 1022.

⁵ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

⁶ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁷ *Reg. v. Randall*, Car. & M. 496.

channel;¹ and it appears that a public river may be used by the public as a highway whenever it suits their convenience, whether such navigation be valuable or not.²

The public right includes all such rights as, with relation to the circumstances of each river, are necessary for the full and convenient passage of vessels along its channel. It is, therefore, no excess of this right, if a vessel, which cannot reach her destiny in a single tide, remain aground till the tide serves, and no toll can be demanded by the owner of the soil for such grounding.³

The right of navigation is a right in all subjects to pass, and to ground, and to anchor at pleasure free from toll, unless the toll is imposed in respect of some other advantage conferred upon them, or, at least, on the public.⁴ Though no toll can be taken for grounding, it is said by Coltman, J., that where vessels ground, perhaps by custom or agreement, a fine may be payable to the owner of the soil for such grounding; but this dictum is rather questioned in *Gann v. Free Fishers of Whitstable*, Lord Chelmsford saying, "It may be correct as applicable to a navigable river, because the owner may have given a consideration for the payment by rendering the river navigable."

A claim to an anchorage due cannot, therefore, exist merely in respect of the use of the soil, it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to the navigation was rendered by the owner of the soil who claimed the anchorage dues.⁵ Evidence of immemorial usage to take such dues will not support such a claim merely as incident to the ownership of the soil; but as anchorage dues are almost, if not universally, in-

Consideration
necessary to
support a
claim to toll.

¹ *A.-G. v. Terry*, L. R., 9 Ch. 423, per Mellish, L. J.; *Williams v. Wilcox*, 8 A. & E. 314; see *Orr v. Ewing v. Colquhoun*, 2 App. Cas. 839.

² *A.-G. v. Lonsdale*, L. R., 7 Eq. 377.

³ *Mayor of Colchester v. Brooke*, 9 Q. B. 339.

⁴ *Gann v. Free Fishers of Whitstable*, per Lord Wensleydale; and see *ante*, Ch. I., p. 45 *et seq.*

⁵ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

cident to a port, the uninterrupted payment of such dues is evidence of the former existence of a port, and that a toll, claimed as a port or anchorage toll, had a legal origin.¹ A liability to make compensation for actual injury done to property by grounding is not to be confounded with a liability to pay toll for casting anchor in the soil itself.²

Right of navigation paramount to property of the Crown and its grantees in the soil.

The right of navigation is paramount to the rights of property of the Crown and its grantees in the bed of the river, and such property cannot be used in any way so as to derogate from, or interfere with, the public right of navigation.³ Any grant, therefore, of the Crown which interferes with the public right is void as to such parts as are open to such objection, if acted upon, so as to effect nuisance by working injury to the public right.⁴ If, therefore, the Crown grant part of the bed or soil⁵ of an estuary or navigable river, the grantee takes subject to the public right; and he cannot, in respect of his ownership of the soil, make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.⁶

“It is perfectly clear,” says Macdonald, C. B.,⁷ “that all the soil under the salt water between high water mark and low water mark is the property of the Crown. Such property has certainly been (as it may be) communicated in a great many instances to the subject, but that is always subservient to the public right of the king’s subjects generally. It is compared by Lord Hale, with his usual simplicity, to the case of a highway. The private right of the Crown may be disposed of, but

¹ *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. 192. See as to tolls in ports, *ante*, Ch. I., p. 45 *et seq.*, and *post*, Ch. IX.

³ *Gann v. Free Fishers of Whitstable*, *supra*; *Foreman v. Free Fishers of Whitstable*; *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁴ *A.-G. v. Parmeter*, 10 Price, 412.

⁵ *Rex v. Montaguc*, 4 B. & C. 598.

⁶ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; see also *A.-G. v. Parmeter*, 10 Price, 412—H. L.

⁷ *A.-G. v. Parmeter*, 10 Price, p. 400.

“the public right of the subject cannot, even if it be within this grant.” Thus it has been held, that the obstruction by artificial means of a navigable river, though of more than twenty-one years’ duration, will not operate as a bar to the public right.¹

A navigable river is a public highway navigable by all her Majesty’s subjects, in a reasonable way and for a reasonable purpose.² “The right of the public on navigable rivers is not confined to the passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient to those ends.”³

A navigable river is a public highway navigable in a reasonable way and for a reasonable purpose.

For traffic there are rights *eundo et redeundo et commorando*, so far as reasonable for loading, and for a wind.⁴ “A navigable river,” says Wood, B.,⁵ “is a public highway, and all persons have a right to come there in ships and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as to work a private injury, they are liable to an action. The privilege of the plaintiff must be subservient to the right of the public.”

A riparian owner has a right to moor a vessel of ordinary size alongside a wharf for the purpose of loading and unloading at reasonable times and for a reasonable time; and the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, though the vessel may overlap his premises; though such a vessel could not be allowed to interfere with the proper right of access to the neighbour’s premises, if used as a dock by vessels.⁶

The banks of navigable rivers are, as has been before explained, not *publici juris*, but are private property; and there is, therefore, no common law right in the public to

No public right of landing, mooring or towing on the banks.

¹ *Vooght v. Winch*, 2 B. & Ald. 662.

² *Original Hartlepool Colliers v. Gibb*, 5 Ch. D. 713, per Jessel, M. R.

³ Per Bayley, J., in *Rex v. Russell*, 6 B. & C. 566.

⁴ Per Holroyd, J., in *Rex v. Russell*, 6 B. & C. 566.

⁵ *Anon.*, Durham Assizes, 1808; 1 Camp. 517, note.

⁶ *Original Hartlepool Colliers v. Gibb*, 5 Ch. D. 713.

land themselves or their goods, or to moor their vessels thereon, or to pass over the banks for the purpose of towing vessels or barges. Such rights, in all cases, depend on usage or prescription.¹ The right of towing does exist by custom on most navigable rivers; and in the case of *Wyatt v. Thompson*,² a jury found, "That the custom of "mooring barges in the Thames at low water is for one "tide at the piles in front of the wharf, and if there are "no piles, the custom does not allow barges to moor at the "wharf unless through distress."

Private rights
arising out of
the public
right.

Riparian owners on the banks of a tidal navigable river have similar rights and natural easements to those which belong to a riparian owner above the flow of the tide subject to the public right of navigation.³

Right of
access,

The right to navigate a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river; and the latter is a private right to the enjoyment of land, the invasion of which may form ground for an action of damages or for an injunction, for the right of a riparian owner to the use of the stream does not depend on the ownership of the soil of such stream, but of the soil bounding it.⁴

"Unquestionably the owner of a wharf on the bank (of "a public navigable river) has, like every other subject of "the realm, the right of navigating the river as one of the "public. This, however, is not a right coming to him *quâ* "owner or occupier of any lands on the bank; nor is it a "right which *per se* he enjoys in a manner different from "any other member of the public. But when this right "of navigation is connected with an exclusive right of "access from a particular wharf, it assumes a very "different character. It ceases to be a right held in

¹ *Ball v. Herbert*, 3 T. R. 262; see *ante*, Ch. II., p. 78.

² 1 Esp. 252.

³ *Lyon v. Fishmongers' Co.*, 1 App. C. 662. See *ante*, Ch. II., p. 86.

⁴ *Ib.*

“common with the rest of the public, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages, or restrained by an injunction.

“I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary owner underlying and controlled, but not extinguished, by the public right of navigation.”¹

This right of access would seem to include the right of landing in the ordinary manner, and of passing over the soil of the bed of the river at low water for that purpose, even where the soil is not in the Crown, but in a private owner, as it is necessary for the full enjoyment of the right of navigation,² and as the right of navigation exists at all states of the tide.³

includes right of landing and crossing the shore for that purpose.

Any interference with the right of access is an injury to private property, and as such actionable without proof of special damage.⁴

The obstruction of the navigation of a public navigable river is a public nuisance, and the subject of indictment⁵ and information,⁶ or of an action⁷ on proof of special damage. Obstructions can also be abated by decree.⁸

Obstruction of the public right is a public nuisance.

The Crown cannot interfere with the public right by grant;⁹ it can only be abridged by Act of Parliament, writ *ad quod damnum*, or natural causes.¹⁰

¹ Lord Cairns in *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662.

² *Marshall v. Ulleswater Co.*, L. R., 7 Q. B. 172; see *ante*, Ch. I. p. 33.

³ *Mayor of Colchester v. Brooke*, 7 Q. B. 639.

⁴ *Rose v. Groves*, 5 M. & G. 613; and see *ante*, Ch. II., p. 28.

⁵ *R. v. Grosvenor*, 2 Stark. 511.

⁶ *A.-G. v. Richards*, 6 Anst. 613.

⁷ *Rose v. Miles*, 4 M. & S. 101; cf. remarks of Parke, J., in *Duke of Newcastle v. Clark*, Moore, Rep. 666.

⁸ *A.-G. v. Parmeter*, 10 Price, 412.

⁹ *A.-G. v. Parmeter*, 10 Price, 412 (H. L.); *A.-G. v. Johnson*, 1 Wils. Ch. C. 87.

¹⁰ *R. v. Montague*, 6 D. & R. 616; 4 B. & C. 89.

Thus in the case of *A.-G. v. Parmeter*,¹ buildings, erections, and inclosures, between high and low water mark in the harbour of Portsmouth, interrupting the flux and reflux of the tide, and obstructing the public right of navigation, were abated by decree of the Court of Exchequer, although they were erected by sanction and authority of the corporation under a grant from the Crown, the Court being of opinion, that “where a part of
“the sea coast or shore, being the property of the Crown,
“and giving *jus privatum* to the king, is granted to a
“subject for uses so as to be detrimental to the *jus*
“*publicum* therein, such grant is void as to such parts as
“are open to such objection, if acted upon so as to effect
“nuisance by working injury to the public right, or it is a
“grant which does not divest the Crown or invest the
“grantee.”

Building locks on the Thames to the obstruction of navigation was, in an early case, held to be a nuisance, Holt, C. J., saying: “To hinder the course of a navigable
“river is against Magna Charta, and anything which
“aggravates the fact, though not directly to the issue,
“may be given in evidence upon it, as here the taking of
“money to let people pass.”²

Bringing a large ship of 800 tons into Billingsgate dock has been held to be a public nuisance to the dock, for which an indictment would lie.³

To divert the stream of a public river so as to affect its force is an injury to navigation. Thus M. was fined 200*l.* for diverting a part of the Thames, by which he weakened the current to carry barges; and such a thing cannot be done without an *ad quod damnum*.⁴ The owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance, such as throwing stone, slate, &c. into the bed of a river, caused by acts of his

¹ 10 Price, 378; see also *A.-G. v. Burridge*, 10 Price, 350; *A.-G. v. Richards*, 2 Anstr. 603.

² *R. v. Clark*, 12 Mod. 615.

³ *Reg. v. Leach*, 6 Mod. 145.

⁴ *Hind v. Mansfield*, Noy, 103.

workmen in carrying on the works, though done by them without his knowledge, and contrary to his general orders.¹

It is not, however, every erection on the bed of tidal waters which is *per se* illegal and a nuisance to the navigation, and so liable to be abated on indictment. Such an erection, if made by the Crown or its grantees so as not to interfere with any private or public rights, would appear to be a legal use of their property, though covered with water.² Any erection on the bed or foreshore of tidal waters by a person not the owner is a *purpresture*, and is, probably, liable to be abated at suit of such private owner;³ but whether such erection is a nuisance or not is a question of fact for the jury. Thus the building of a bridge partly in the bed of a navigable river is not necessarily a nuisance, and a verdict which negatived actual obstruction was held in effect an acquittal. Lord Campbell saying: "An indictment would not lie merely "for erecting piers in a navigable river,—it must be "laid '*ad commune nocumentum*.'"⁴

Erections on the bed of public rivers not necessarily a nuisance.

In the case of *A.-G. v. Terry*,⁵ an information was filed against the defendant for obstructing the navigation of the tidal and navigable river Stour. The defendant, a wharf owner, drove piles into the bed of the river, extending his wharf so as to occupy three feet out of a breadth of about sixty available for navigation; and it was held by the Court of Appeal, affirming a decree of the Master of the Rolls, that this was such a tangible and substantial interference with the navigation as ought to be restrained by the Court. The Master of the Rolls (Sir G. Jessel) was of opinion that, independent of any proof of actual obstruction, an injunction ought to be granted, on the

A.-G. v. Terry.

¹ *Reg. v. Stephens*, L. R., 1 Q. B. 702; for statutory prohibitions against throwing ballast into navigable rivers, see *post*, p. 474.

² *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

³ *Ib.*

⁴ *Reg. v. Betts*, 16 Q. B. 1022; *R. v. Randall*, Car. & M. 496;

Rex v. Ward, 4 A. & E. 364, per Lord Tenterden in *Rex v. Russell*, 6 B. & C. 566. See as to the right of the Crown and its grantees to build on the bed of navigable rivers, *ante*, Ch. II. p. 73; and as to rights of riparian owners to build *ripariæ muniendæ causâ*, Ch. III. p. 147.

⁵ L. R., 9 Ch. 423.

ground that no man has a right to build on the bed of a navigable river, and that it is not any answer to say that at the present moment the obstruction is not a nuisance, for it may become so,—a change may take place in the mode of navigating the river, so as to make that part of it navigable which was not before navigable in any useful sense. His lordship therefore held that, although an indictment would not lie until an actual nuisance had been committed, a Court of equity ought to interfere to restrain the continuance of the obstruction.

The Lord Chancellor and Lords Justices, in the Court of Appeal, confine themselves to the question that there was an actual obstruction and nuisance to the navigation; but Cairns, L. C., says: "I cannot say that there might not be an encroachment of so trifling a nature that the Court would not interfere;"¹ and Mellish, L. J., says: "It is true there may be spots in the river where space is not wanted, and where that which would otherwise be a nuisance might not be such an obstruction of the highway as to make it the duty of this Court to interfere; but it appears to us that the space is actually wanted for the purposes of navigation, and in such a case there is no difference between a highway on land and a highway on water. It is no answer to say that there is room for the ships, and that if they are navigated with skill and care there will be no obstruction. Those who use the river are entitled to say that they have a right to the whole of the space; and, in my opinion, it is not any answer that the obstruction only occurs at certain times of the tide, and in some respects the alteration would be advantageous. The advantage of one person cannot be set off against the disadvantage of another. If this is an indictable nuisance there must be a remedy in the Court of Chancery, and that remedy is by injunction."

¹ See *Reg. v. Russell*, 3 E. & B. 942; *R. v. Tindal*, 6 A. & E. 143.

In *A.-G. v. Lonsdale*,¹ Malins, V.-C., held that the erection of a jetty by the owner of the bed of a tidal river ought to be restrained by injunction, on the ground that though no actual damage to the navigation was proved, future damage might result; but Lord Blackburn in *Orr Ewing v. Colquhoun*,² remarking on these cases, says: "In the case of *A.-G. v. Lonsdale*, the obstruction was in a tidal river, but it occupied one-third of the breadth of the river. In *A.-G. v. Terry*,³ there was an actual occupation, by the piles put in by the defendant, of part of what was used for the navigation and wanted for navigation. The Master of the Rolls submitted an opinion that the Court of Equity might order the piles to be removed, though doing no present damage to the navigation, if there might be damage hereafter: I apprehend on the ground of the piles being placed on the soil of the Crown, and therefore a wrong to the Crown. How that may be in such a case it is unnecessary to consider. I think it clear law in England that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of some injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it—I think that the land being covered with water is, in such a case, a mere accident, and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away."

It would seem, therefore, to be the law, that the erection of works on the bed of tidal waters is not indictable or actionable as a nuisance unless and until actual interference with the navigation is proved, and that no antici-

¹ L. R., 7 Eq. 377. ² 2 App. Cas. p. 61. ³ L. R., 9 Ch. 423.

pated injury is sufficient to maintain an action; but that an erection which, at the time of creation, was harmless, may, owing to the change of bed or other causes, become at some future time a nuisance; and as soon as that is the case, it may be abated by indictment or decree.

Where
causing actual
destruction,
how justifi-
able.

Where, however, there is any actual obstruction to the navigation, it would appear that the question whether such obstructions are a nuisance or not will depend on this,—Whether upon the whole they produce public benefit or not; not giving to the terms public benefit too extended a sense, but applying them to the public frequenting the place or port where the erection is,—any private benefit to the trade of the person who causes the obstruction being too remote to be held to the advantage of the public generally so as to justify the erection.¹

R. v. Russell.

In the case of *R. v. Russell*,² which was the trial of an indictment for obstructing the navigation of the Tyne by erecting some coal staiths there, Bayley, J., left these questions to the jury: “Were the staiths erected in a “reasonable place? Was there a reasonable space left for “the public navigating in the Tyne? Were the staiths “a public benefit? Did the public benefit countervail “the prejudice done to individuals?” The jury in consequence of this direction found the defendants not guilty, and the Court of Queen’s Bench, on a motion for a new trial on the ground of misdirection by the learned judge, refused to disturb the verdict.

Rex v. Ward.

In *Rex v. Ward*, Lord Denman, delivering the judgment of the Court, thought *R. v. Russell* not well decided; and lays down the law that it is no defence to such an indictment (*i. e.* for obstructing a navigable river) that though the work be in some degree a hindrance to navigation, it is advantageous in a greater degree to other uses of the port³ (or river). In *Reg. v. Randall*, at *nisi prius*, Wight-

¹ *A.-G. v. Terry*, *supra*; *R. v. Ward*, 4 A. & E. 384; *Rex v. Grosvenor*, 2 Stark. 511.

² 6 B. & C. 566.

³ 4 A. & E. 384.

man, J., held that the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether a benefit resulted to the general navigation,—*i. e.* that they were not to consider the defence that since the wharf was made boats of heavy burden could unlade there, which before anchored in the middle of the river, and so the channel was kept clear.¹

Referring to *R. v. Grosvenor*² in *Rex v. Ward*, Lord Denman further says: “Lord Tenterden in *R. v. Grosvenor* “only submitted to the jury whether the public had benefited by the alteration; and this was plainly confined to “such benefits as the public might have derived from it in “the exercise of that very right, the invasion of which was “treated as a nuisance.”³

In *A.-G. v. Terry*,⁴ Jessel, M. R., disapproves in strong terms of *Rex v. Russell*, and expresses his view of the law in an elaborate judgment. “It was said that “that had been decided in the well-known case of *Rex v. Russell* (6 B. & C. 566). In my opinion that case is “not law, and it is right to say so in the clearest terms; “because it is not well that cases should continue to be “cited which have been virtually overruled, although the “judges have not said so in express terms. In that case “there had been some staiths erected in the river Tyne, “and a very eminent judge of those days, Mr. Justice “Bayley, in charging the jury, had pointed out that they “were erected simply for the purpose of carrying on “trade. He said (6 B. & C. 570) that ‘the staiths were “‘not merely a private benefit, for that by means of “‘them the coals were brought to market at a smaller “‘expense, and in a better condition, in both which “‘respects the public were benefited;’ and he then left

¹ Car. & M. 496.

² 2 Stark. 511, at *nisi prius*. (A corporation being conservators of a river and owners of the soil cannot authorize a lessee to erect a wharf

which produces inconvenience to the public in the use of the river for navigation.)

³ 4 A. & E. 384.

⁴ L. R., 9 Ch. 423.

“to their decision the following questions: ‘Were the
 “ ‘staiths erected in a reasonable place? Was there a
 “ ‘reasonable space left for the public navigating in the
 “ ‘Tyne? Were the staiths a public benefit? Did the
 “ ‘public benefit countervail the prejudice done to in-
 “ ‘dividuals?’ The jury said that in consequence of this
 “ ‘direction they found the defendants not guilty.

“The case was brought before the full Court, con-
 “sisting of the same judge, Mr. Justice Bayley, and
 “two other very eminent judges, Mr. Justice Holroyd
 “and Lord Tenterden. Mr. Justice Bayley adhered to
 “his own opinion; Lord Tenterden differed; Mr. Justice
 “Holroyd, though he came to the conclusion the verdict
 “should not be disturbed, did not lay down the law quite
 “in the same terms as Mr. Justice Bayley as regards the
 “public benefit. As I understand it, he only put the
 “law to this extent, that the public benefit might possibly
 “countervail the public injury; for really they are both
 “public, so that, taking it on the whole, the public was
 “benefited.

“That case came under discussion in the case of *Rex v.*
 “*Ward* (4 A. & E. 384), where Sir William Follett,
 “whose interest it was to support *Rex v. Russell* as far as
 “he could, thus speaks of it (4 A. & E. 395): ‘The
 “ ‘doctrine of *Rex v. Russell* need not come under dis-
 “ ‘cussion; nor is there any conflict of authorities.
 “ ‘Erections may be made in a harbour, below high water
 “ ‘mark, and in places where vessels might, perhaps, have
 “ ‘sailed; and the question whether they are a nuisance,
 “ ‘or not, will depend on this: whether, upon the whole,
 “ ‘they produce public benefit; not giving to the terms
 “ ‘“public benefit” too extended a sense, but applying
 “ ‘them to the public frequenting the port.’

“I take it that that statement in argument of Sir
 “William Follett was a correct statement of the law.
 “Lord Denman, in giving the opinion of the full Court
 “of Queen’s Bench, says (4 A. & E. 402): ‘The greatest
 “ ‘weight is due to the authority of Mr. Justice Bayley,

“ ‘who thus charged the jury, and afterwards upheld his
 “ ‘opinion in this Court; and no person can hesitate to
 “ ‘ascribe every quality of an excellent judge to Mr.
 “ ‘Justice Holroyd, who agreed with him in thinking
 “ ‘that the rule for a new trial for misdirection ought to
 “ ‘be discharged. But, when we examine the grounds of
 “ ‘this opinion, as delivered by the latter, they will not be
 “ ‘found to support in any degree the proposition just
 “ ‘noticed in the summing up’—that is, in the summing
 “ ‘up of Mr. Justice Bayley—‘on the contrary, he plainly
 “ ‘considers the topic to have been introduced as an
 “ ‘answer to some observations invidiously made to the
 “ ‘defendant’s prejudice by the counsel who conducted
 “ ‘the prosecution, and thinks that it must be qualified
 “ ‘throughout the summing up, and even to its close, by
 “ ‘its connection with that argument. Mr. Justice Bayley
 “ ‘himself, who delivered his judgment after Mr. Justice
 “ ‘Holroyd, takes a much wider range, maintaining the
 “ ‘right to estimate the balance of public benefit and
 “ ‘public inconvenience, and to take into the account of
 “ ‘the former the advantages that may be derived from
 “ ‘the change by any part of the public. He takes for
 “ ‘an example the purchasers of coals sent from the in-
 “ ‘dicted staith to a distant market. Lord Tenterden
 “ ‘thought it wrong to submit such extensive views to the
 “ ‘jury, and that the question ought simply to have been,
 “ ‘“Whether the navigation and passage of vessels over
 “ ‘“this public navigable river was injured by those
 “ ‘“erections.”’ Now that is the final judgment; but
 “ ‘there had been a previous judgment, a short judgment,
 “ ‘as to the whole of the case, and what Lord Denman
 “ ‘said was this (4 A. & E. 400): ‘My understanding at
 “ ‘the trial certainly was, that the question was much the
 “ ‘same as that in *Rex v. Russell* (6 B. & C. 566), a case
 “ ‘the authority of which has been much doubted, and is,
 “ ‘perhaps, likely to be more so as it is further examined,’
 “ ‘so that it must be taken to have been the opinion of the
 “ ‘full Court of Queen’s Bench, in Lord Denman’s time,

“ that the summing up of Mr. Justice Bayley in *Rex v. Russell* could not be supported; he does not say so in distinct and clear terms, but the effect of the judgment of the full Court was, that they agreed with Lord Tenterden, and disagreed with Mr. Justice Bayley. What really were the points on which they disagreed? I think they were two, and I think on those two points the charge of Mr. Justice Bayley was erroneous. In the first place, I think the benefit, whatever it is, must be a public benefit to the same public, that is, the same public who use the navigation, or, as it was put by Sir William Follett, ‘the public frequenting the port.’ In the next place, I think that the benefit to the public must be a direct benefit, whereas the benefit which he was considering was an indirect, and, as it appears to me, too remote a benefit. It was that coals came to the London market in rather a better condition, and were, possibly, sold at a lower price. That does not appear to me to be a public benefit in the sense of the term in which it ought to be used when considering the question of nuisance.

“ Then, it may be asked, what is a public benefit in my view? I say it is a benefit of a similar nature, showing that on the balance of convenience and inconvenience the public at that place not only lose nothing, but gain something by the erection. There are two cases in the books which will illustrate my meaning, and, I think, fairly show what sort of public benefit it is. The first is this. In the case of a tidal harbour of irregular shape, it may be desirable to straighten the sides, the result of which would be, of course, in the parts where you take away the water-way, to diminish the area usable for navigation; in those parts where you add to the water-way you would increase the area. If, in the course of this straightening, the whole of the harbour is made larger and more commodious, then, I think, the public benefit gained at the particular point where the navigable water is narrow overbalances the public injury,

“and, in that sense, that improvement of the harbour would not be a nuisance; and that is what I understand Lord Hale intends to say in the passage which has been referred to.¹ Another case is this, which also appears in reported cases: Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river, and, of course, according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the waterway, and to some extent, perhaps to a more or less material extent, obstruct the navigation.² But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury, if injury it be, to the navigation, that, on the whole, a Court of justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case, also, it would be a public benefit that would counterbalance the public injury. I give those as illustrations, but I think it must be confined, as put by Sir William Follett in his argument, to cases of public benefit, and not used in too extended a sense.

“In this case really I have no evidence whatever of benefit to the public. The defendant is doing this for the purposes of his own trade: it is too remote a benefit to the public to say that the encouragement of the trade of a single individual is therefore a benefit to the public.”³

Weirs or other fixed engines for taking fish, which obstruct the whole or part of the navigation of a public navigable river, are illegal, and a nuisance, unless granted

Weirs obstructing navigation illegal.

¹ Hale de Portibus Maris, Harg. Tract. 85; The Sutton Pool case, cited 6 B. & C. p. 572; The Portsmouth Harbour case, cited ib.

² See *Reg. v. Betts*, 16 C. B. 1022.

³ For statement of the above case, see *ante*, p. 423.

by the Crown before the reign of Edward I. It does not appear that the Crown ever had the right to obstruct the navigation by so erecting weirs; but such weirs as had been erected under grants from the Crown before the reign of Edward I., were subsequently legalized by stat. 25 *Edw. III. c. 4*. If a weir which has been so granted and legalized, at the time of the grant obstructed the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only part of the navigable passage remaining; but where the Crown had no right to obstruct the whole passage of the river, it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore, in such a case, the weir would become illegal, upon the rest of the river being so choked, that there could be no passage elsewhere.

Williams v.
Wilcox.

The above propositions were laid down by the Court of Queen's Bench in the case of *Williams v. Wilcox*.¹ "If," says Lord Denman, C. J., "the subject had, by common law, a right of passage in the channel of the river, paramount to the power of the Crown, we cannot conceive such right to have been originally other than a right locally unlimited to pass in all and every part of the channel. The absence of any right to go *extra viam*, in the case of a channel being choked, and the want of definite obligation to repair, only render it more important that the right of passage should extend to all parts of the channel. If, subject to this right, the Crown had the prerogative of raising weirs in such parts as were not required by the subject for the purposes of navigation, it follows, from the very nature of a paramount right on the one hand, and a subordinate right on the other, that the latter must cease whenever it cannot be exercised but to the prejudice of the former. On the

¹ 8 A. & E. 314. For the law as to weirs in non-navigable rivers, see *Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R.,

5 C. P. 657, *ante*, Ch. VI., p. 367; and as to weirs obstructing fishery in tidal waters, p. 358.

“other hand, there is nothing unreasonable in supposing the right to erect the weir, subject to the necessities of the public when they should arise. We cannot see any satisfactory evidence that the power of the Crown in this respect (*i. e.* of obstructing the navigation) was greater at the common law before the passing of Magna Charta than it has been since. We are therefore of opinion that the legality of the weir cannot be sustained on the supposition of any power existing by law in the Crown in the time of Edward I., which is now taken away. But this does not exhaust the question, because what was not legal at first, may have been subsequently legalized. If, upon examination of the stats. 23 *Edw. III. c. 4*, &c. relied on by the plaintiff, such a grant, whether valid or not at common law, appears to be saved by their operation, the object of the defendants falls to the ground; and we think that to be the true construction of the statutes.”¹

Though it would appear that a public nuisance may be abated in a peaceable manner, a private individual cannot abate a public nuisance, unless it does him some special injury beyond that which is suffered by the rest of the public.² Thus, in *Mayor of Colchester v. Brooke*,³ it has been held, that where property, such as oysters, are placed in the bed of a navigable river so as to be a nuisance, a person navigating is not justified in damaging such property, by running his vessel against it, if he has room to pass without so doing. So, in *Dimes v. Petley*,⁴ the defendant, under similar circumstances, was held not justified in running his ship against a wharf projecting into a public river; the Court being of opinion that a person under such circumstances, can only interfere with a public nuisance so far as is necessary to exercise his right of passage, and cannot justify doing any damage to the

A private individual cannot abate a public nuisance.

¹ Per Lord Denman, C. J., in *Williams v. Wilcox*, 8 A. & E. 314.

³ 7 Q. B. 339.

⁴ 15 Q. B. 283.

² See *post*, Chap. X.

property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience.

Obstruction of navigation actionable on proof of special damage.

The obstruction of a public navigation is, moreover, actionable on proof of special damage. Thus, where the plaintiff was navigating his barge on a public navigable creek, and defendant wrongfully moored his barge across it, and kept the same so moored, and prevented the plaintiff from navigating his barges, whereby the plaintiff had to convey his goods a great distance by land, this was held to be such special damage for which an action would lie.¹

Obstruction of right of access actionable without giving proof.

Any interference with the right of access to a wharf or landing-place, being an injury to property quite distinct from the injury to the public right, is actionable, without any proof of special damage.² Whether an obstruction to a river amounts to an interference with the right of access is a question of fact to be determined in each particular case.³

Responsibility for damage caused by obstructions.

Any person who erects or keeps in a navigable river an obstruction to the navigation is responsible for all injury caused thereby. Thus, in *Brownlow v. Metropolitan Board of Works*,⁴ the defendants were held liable at the suit of the owner of a vessel which sustained damage by grounding on a pile negligently placed on the foreshore by a contractor employed by them. So, the owners of structures on the shores of public rivers, which are not nuisances if kept in proper repair, may be liable for damage occasioned by negligence. Thus, in *White v. Phillips*,⁵ the defendants, wharf owners on the river Thames, kept a campshed, a structure of piles and planks, placed there by their predecessors to support an excavation in front of the wharf. The campshed was originally

¹ *Rose v. Miles*, 4 M. & S. 101; see *Chicester v. Lethbridge*, Willes, 71; *Williams' case*, 5 Coke, 145.

² *Lyon v. Fishmongers' Co.*, 1 App. C. 662; *Rose v. Groves*, 5 M. & G. 613; see *ante*, p. 420,

and Chap. II., p. 88.

³ *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.).

⁴ 16 C. B., N. S. 546.

⁵ 15 C. B., N. S. 245.

properly constructed, but was suffered to be out of repair. The Court held that the defendants were liable for damage caused to a barge which was brought to the wharf for the purpose of loading, and was there so moored by those in charge of her, that, on the recess of the tide, she struck on a submerged pile of the campshed, and was injured; on the ground that a duty was cast on the defendants to keep the campshed in repair, or to give notice of the danger. The mere fact, however, that the cause of injury is the property of a man, does not make him responsible for damage caused by it.¹ Thus, where a declaration stated that the defendants were possessed of a mooring anchor, kept and fixed by them in a known part of a navigable river, covered by the ordinary tides; that the anchor became removed, and remained in another part of the river, covered by the ordinary tides, not indicated, whereof the defendants had notice; and although they had means and power of refixing and securing the anchor, and indicating it, they neglected to do so, whereby the plaintiff's vessel, while sailing in a part of the river ordinarily used by ships, ran foul of and struck the anchor, and was thereby damaged, it was held that the declaration was bad, as not showing that defendants were privy to the removal of the anchor, or that it was their duty to refix it, and to indicate it.²

Maule, J. : "This declaration, in effect, states that an anchor, the property of defendants, somehow was placed in a part of a navigable river; but *how*, is not stated. The circumstances of the anchor being defendants' property, will not, of itself, render them liable. To have this effect, it must amount to a public nuisance or a private injury *by them*. This declaration carefully steers clear of stating that the defendants did the mischief. It shows about as good a cause of action as if

¹ See *River Wear Commissioners v. Adamson*, 2 App. Cas. 771, *post*, p. 439.

² *Handcock v. York and Newcastle Railway*, 10 C. B. 348.

"it stated that somebody beat the plaintiff with the defendants' stick. The case falls within *The King v. Watts*,¹ and *Brown v. Mallet*."²

In *Curling v. Wood*,³ the defendant, a wharfinger, was held liable for negligently mooring the plaintiff's vessel, which was alongside his wharf, "for reward to him the defendant," whereby it was damaged on the recess of the tide, by striking against some woodwork in front of the wharf. It was argued that there was no duty disclosed, whereby the action could be maintained; but the Court held, that whatever the duties of wharfingers might be generally, here the defendant moored the vessel for profit to him, and was liable for negligently placing the vessel where it became damaged, he knowing the state of the woodwork.

Obstructions
authorized by
statute.

Where the obstruction of the public right of navigation is authorized by statute, no action will lie for damage caused by the due execution of the works authorized by the statute, but if the persons so authorized exceed their powers or are guilty of negligence in carrying out their works, they will be responsible for damage so occasioned.⁴

In *Kearns v. The Cordwainers' Co.*,⁵ the conservators of the Thames were authorized by their Act (sect. 53 of 20 & 21 Vict. c. cxlvii.) to grant licences to owners and occupiers of land fronting the Thames, to make piers and jetties, &c. on the bed of the river; and it was provided by sect. 179, that none of the powers of the Act were to abridge any right to which any occupiers of any lands were entitled. It was held, that no action would lie by the owner of land on the banks, against another owner, for erecting a jetty by licence from the conservators, which merely interfered with the plaintiff's right as one of the public to navigate the river, the effect of the statute being to license buildings

¹ 2 Esp. N. P. C. 675.

² 5 C. B. 599.

³ 16 M. & W. 628 (Ex. Ch.).

⁴ As to this, see *Cracknell v. Thetford*, L. R., 4 C. P. 529, and *ante*,

Chap. V., p. 266.

⁵ 6 C. B., N. S. 388; see *A.-G. v. Conservators of the Thames*, 1 Hem. & M. 1.

which interfered with the navigation of the river. But in *Lyon v. Fishmongers' Co.*,¹ it was held, that under the same section no interference with the private right of access to a wharf was authorized, such a right being within the exception in sect. 179.

In *Abraham v. Great Northern Railway*,² to an action brought for obstructing the navigation of a river, it was pleaded that the works complained of were authorized by the Railways Clauses Consolidation Act, and the Court held that the Act applied as well to navigable as to non-navigable rivers, and that the works were authorized and that the plea was good, although it did not aver that "as little damage was done as possible."

In *Jolliffe v. Wallasey Local Board*,³ the defendants were authorized by Act of Parliament to make a pier, &c. They did so according to plans deposited with the admiralty. They also made a floating landing-stage attached by chains to the land, and also by anchors fixed by permission in the bed of the Mersey beyond the limits on their plans. The plaintiff's steam tug struck on one of the anchors and was injured. On a special case stated by an arbitrator it was found that the defendants in doing what they did, acted under a *bonâ fide* belief that they were acting within their powers—that they were not guilty of negligence in the mode of laying down and mooring the anchors, but that they were guilty of negligence in not properly buoying the anchors so as to indicate their position; and the Court held upon this finding that they were guilty of negligence, and responsible for the damage.

In *Brownlow v. Metropolitan Board*,⁴ it was held, that the Metropolitan Board of Works have no power under the Metropolis Management Act (18 & 19 *Vict. c.* 120, s. 135), to erect any works on the bed of the Thames without first obtaining the consent of the admiralty, and of the conservators of the river, and that they were liable for

¹ 1 App. Cas. 662; see *ante*, Chap. II., p. 86.

² 16 Q. B. 586.

³ L. R., 9 C. P. 62.

⁴ 16 C. B., N. S. 546.

damage done to a vessel from grounding on a pile negligently placed on the foreshore by a contractor in their employment.

Duties and liabilities of persons navigating.

It is the duty of a person using a public navigable river, with a vessel of which he is possessed, and has the control and management, to use reasonable skill and care to prevent mischief to others; and in the case of collision he must sustain, without compensation, the damage occasioned to his own vessel, and is liable to pay compensation for that sustained by another navigated with skill and care; and this liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it.¹ This duty arises out of the control of the vessel, and may be transferred with the possession and control of the vessel to another person. Where the vessel ceases to be under the control of the owner, this obligation ceases.²

Arises out of control of vessel.

Vessels sunk by accident.

Thus, it has been held, that where a vessel is sunk in a navigable river by accident or misfortune, an indictment will not lie against the owner for not raising it.³ It was said by Lord Ellenborough at *Nisi Prius*,⁴ that the owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, and that it is not sufficient to place a watchman near to point out the danger; but in the subsequent cases of *Brown v. Mallet* and *White v. Crisp*, Lord Ellenborough is said to go too far, and to assume in all cases that the owner of a vessel is bound to mark the wreck with a buoy, whereas the law is, that if a vessel be sunk by accident and without any default of the owner or his servant, no duty is ordinarily cast on him to remove it, or use any precaution by placing a buoy or otherwise to prevent other vessels from striking against it, except for so long as he remains in possession and control of it—the liability ceases when the control ceases.

¹ *Brown v. Mallet*, 5 C. B. 599. For Rules of the Sea as to lights, signals, sailing, steering and collisions, see *ante*, pp. 403—411.

² *White v. Crisp*, 10 Ex. 312.

³ *R. v. Watts*, 1 Esp. 675.

⁴ *Harmond v. Pearson*, 1 Camp. 515.

The law on this question of liability is thus stated by Lord Blackburn in the House of Lords in the case of the *River Wear Commissioners v. Adamson*.¹

“ Property adjoining to a spot on which the public have a right to carry on traffic, is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault and liable to make it good; and he does not establish this against a person merely by showing that he is the owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner. But he does establish such liability against any person who either wilfully did the damage or neglected that duty which the law casts on those in charge of a carriage on land and a ship or float of timber on water, to take reasonable care and to use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage. And if he can prove that the person who has been guilty of either stood in the relation of servant to another, and that the fault occurred in the course of the employment, he establishes a liability against the master also; . . . but there is also concurrent liability in the servant, who is not discharged from liability because his master also is liable. And in a very large number of cases the owner of the carriage or ship or float of timber is, or at least is supposed to be, the master of those who were negligent, and consequently the action is most frequently brought against the owner and is very often successful. But the plaintiff succeeds, not because the defendant is owner of the carriage, or ship or float, but because those who were guilty of the negligence were his servants.”

¹ 2 App. Cas. 767.

In the above case¹ their lordships held, that where a ship was driven against a pier through the violence of the winds and waves after having been abandoned by the master and crew, the owner was not liable either at common law or under the *Pier and Harbours Act*, 1847 (10 *Vict. c. 27*) (overruling *Dennis v. Tovell*, L. R., 8 Q. B. 10), for the damage thereby occasioned.

Their lordships were all agreed that at common law the owner would not be liable unless the ship was under his control, or that of his servants, but much hesitation was felt, as to the construction of the section of the statute imposing a further liability on the owners of vessels. Lord Cairns, L. C., was of opinion that the statute was passed to make the master liable, whoever was navigating the ship, without showing that they were his servants, and that it proceeded on the assumption that damage had been done for which compensation could be recovered at common law against some person—*i.e.* damage occasioned by negligent or wilful conduct, and not by the act of God.

Lord Hatherley agreed with the opinion of the Lord Chancellor with extreme doubt and hesitation.

Lord O'Hagan held that the section pointed to something done by the act of man, or to the act of the person in charge, and that the ship was derelict.

Lord Blackburn held, with hesitation, that the hardship was great enough to justify putting a considerable strain on the words of the Act to avoid it,—that the legislature could not have meant to shift the burthen of a misfortune befalling the owner of the pier, from the owner of the pier who at common law would have to bear it, to the owner of the ship wholly free from blame, and involved, without fault of his, in a common misfortune. It may have been said, but can hardly have been intended to be said.

Lords Cairns, Hatherley, and Blackburn dissented from the reasoning of the Court of Appeal²—*i.e.* that the accident was occasioned by *vis major* and the act of God, and *therefore* the defendant was not responsible—Lord Cairns say-

¹ 2 App. Cas. 743.

² 1 Q. B. D. 546.

ing: "If a man contracts that he will be liable for the
 "damage; or if an Act of Parliament declares he shall
 "be liable, I know no reason why he should not be liable,
 "whether the state of circumstances is brought about by
 "the act of man, or by the act of God."¹

The public right of navigation may exist in non-tidal as well as in tidal waters; and where it does so exist, the principles of law which have been stated with regard to tidal waters will equally apply.

Right of navigation in private waters.

But in the case of non-tidal rivers, the right of passage does not exist as a public franchise paramount to all rights of property in the bed, but can only be acquired by prescription, founded on a presumed grant from the owners of the soil over which the water passes. It would not, therefore, appear to extend *prima facie* to a right of passage over the whole of the navigable channel, as in the case of tidal rivers, but to be strictly limited to the extent of the right granted or user proved.

Not a public franchise, but acquired by grant or prescription.

Thus in *Bower v. Hill*,² it was held that a right of way claimed by the plaintiff by reason of his possession of a close, from the said close unto and along a stream or watercourse unto a navigable river, for himself and his servants to pass and re-pass in boats, &c., is not supported by evidence of an user of the way by the occupier of an inn and yard, held as one entire subject, from which yard the plaintiff's close had been lately severed; and it was questioned whether such a claim, even by the occupier of the entire premises, would be sustained by proof that goods were brought to the inn along the watercourse in boats not belonging to the occupier, or navigated by his servants properly so called. Lord Blackburn, in *Orr Ewing v. Colquhoun*,³ says: "The river Leven is an inland stream, "and the tide does not flow up to the spot where the piers "are erected, and, as is pointed out by the Lord President, "the rights of the Crown as regards the soil of the *alveus*,

Bower v. Hill.

Orr Ewing v. Colquhoun.

¹ 2 App. Cas. 750.

Dyson, 1 Taunt. 279.

² 2 Scott, 535; see *Ballard v.*

³ 2 App. Cas. 847.

“ and of the public to navigate, are not the same in such
 “ a river as they are in the sea or in a tidal estuary. In
 “ the present case, however, there is ample evidence that
 “ there had been, at least as long as living memory ex-
 “ tended, a user by the public of the navigation in the
 “ river during the period of the year when the water was
 “ high enough,—that is, according to Mr. Smollett, who
 “ was called for the defence, on an average for two-thirds
 “ of the year; and the very able counsel who argued for
 “ the appellants felt it so impossible to deny that there
 “ was evidence of user in this water way by vessels, such
 “ that similar evidence, if the question had been as to user
 “ of a land way by carriages, would have established the
 “ public right, that he abandoned this point, and I do
 “ not think any of the noble and learned lords who heard
 “ the argument entertain any doubt that the interlocutor,
 “ so far as it finds that the Leven is a navigable river
 “ free to the public, and that the defenders have no right
 “ to execute works which obstruct the navigation, is right.
 “ Now¹ the public who have acquired by user
 “ a right of way on land, or a right of navigation on an
 “ inland water, have no right of property. They have
 “ a right to pass as fully, and as freely, and as safely as
 “ they have been wont to do; but unless there is a present
 “ interference with that right, or it can be shown that
 “ what is now done will necessarily produce effects which
 “ will interfere with that right, there is no *injuria*; and
 “ I think that if there be no *injuria*, the foundation of
 “ the right to have the thing removed fails.”

Obstruction
 of, illegal and
 a nuisance.

The obstruction, therefore, of the navigation of non-tidal waters is illegal and a nuisance. “Above the point reached by the flow of the tides,” says Lord Denman in *Williams v. Wilcox*,² “whether the soil at common law was in the Crown or in the owners of the adjacent lands (a point not free from doubt), there was at least a jurisdiction in the Crown, according to Sir Mathew Hale,³

¹ Page 854.

² 8 A. & E. 333; see *ante*, p. 421

et seq.

³ De Jure Maris, part 1, c. 2, p. 8.

“to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges and boats.”

With regard to large inland navigable lakes, it would seem to be doubtful where such lakes are navigable by the public at common law.¹ However, there is no doubt but that such rights of navigation may be acquired and have practically been acquired, even where the soil of them is private property.² Lakes.

The Conservancy of Navigation.

Lord Hale says,³ that the office of conservancy is of two kinds:—1st, That relating to nuisances in rivers, founded on statute 1 *Hen. IV. c. 12*, whereby it is enacted that there shall be commissions granted to survey and keep the waters of great rivers, and to correct and amend the defaults; and 2nd, The conservancy relating to fishing, mentioned in the statute 1 *Eliz. c. 17*, and founded on the *Statute of Westminster 2, c. 47*, for the protection of salmon.⁴ Origin of conservancy.

The duty of the conservancy of navigation appears to have been entrusted to the Crown as representative of the State. Thus we find that from the earliest times the king, in virtue of his office of Lord High Admiral, was conservator of all ports, havens, rivers, creeks, and arms of the sea, and protector of the navigation thereof;⁵ and, according to Sir M. Hale, there was a jurisdiction in the Crown to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as Formerly in the Crown.

¹ As to this, see *Bristowe v. Cormican*, Ir. R., 10 C. L. 432, per Whiteside, C. J.; 3 App. Cas. 641; *Blomfield v. Johnson*, Ir. R., 8 C. L. C. 8.

² *Marshall v. Ulleswater Co.*, 3 B. & S. 732; L. R., 7 Q. B. 582.

³ Hale, de Jure Maris, Harg. Tracts, p. 23.

⁴ Ib. By 17 Ric. II. c. 9, also, it is enacted that “justices of the peace be conservators of the statutes touching salmons,” the statutes there named being 13 Edw. I. c. 47, and 13 Ric. II. c. 19.

⁵ Hale, de Jure Maris, Harg. Tr. p. 23. It was the custom and duty of the kings of England to defend the realm against the sea, as well

barges and boats.¹ The wording of the early statutes as to weirs—such as the 22nd chapter of Magna Charta, “that all weirs from henceforth shall be utterly put down “by Thames and Medway, and through all England, but “only by the sea coasts”—is evidence of the nature of this prerogative,² which was, however, delegated to various subordinate authorities, of which the commissioners of sewers were the most important.

Commissions
of sewers.

The origin of commissions of sewers, and the principal points relating to them, so far as they deal with matters connected with the law relating to water, have been treated of in a former chapter.³ It will be necessary, however, again briefly to refer to the subject.

Meaning of
the word
sewer.

The term “sewer” is uncertain as regards its derivation, some maintaining that it is compounded of *seoir*, to sit, and *cau*, water;⁴ others that it means merely to *sue* or *issue*, whence *suera*,⁵ while some again derive it from *sea* and *were*.⁶ Mr. Serjeant Callis⁷ holds it to be diminutive of river, it being a fresh water trench compassed in on both sides with a bank, while in modern Acts it is treated as a general term comprising sewers and drains of every description, except drains connecting houses with cess-pools,⁸ and includes also a marsh wall or embankment.⁹ Its application seems to be equally wide. Lord Coke states that “There are three manner of statutes which concern “sewers. The first consists in maintaining and repairing “walls, sewers, &c. The second, in destroying and re- “moving nuisances. The third, which concerns both

as against enemies; Woolrych, 12; Callis, 80; *Hudson v. Tabor*, 2 C. P. D. 290 (C. A.); see *ante*, Chap. I., p. 24 *et seq.*

¹ *Ib.*; Lord Denman in *Williams v. Wilcox*, 8 A. & E. 333. Lord Hale says, “The king has an *interest of jurisdiction* in rivers;” *De Jure Maris*, 8; Woolrych, 3.

² Cf. chapters xv. and xvi. of Magna Charta, which relate to the repairing of banks and bridges, and 12 Edw. I. c. 7; 1 Hen. IV. c. 12; 25 Edw. III. stat. 4, c. 4, &c.; see as to weirs, *ante*, p. 432.

³ *Ante*, Chap. I., p. 24 *et seq.*

⁴ *Termes de la Ley*; Woolrych, Law of Sewers, 3rd ed. p. 1.

⁵ 4 Inst. 275; Woolrych, Law of Sewers, 3rd ed. p. 1.

⁶ Callis, 80; Woolrych, Law of Sewers, 3rd ed. p. 1.

⁷ *Ib.*

⁸ 11 & 12 Vict. c. 63, s. 2; 18 & 19 Vict. c. 120, s. 250; 38 & 39 Vict. c. 55, s. 4.

⁹ *Poplar Board v. Knight*, 28 L. J., M. C. 37; cf. *Reg. v. Local Board of Godmanchester*, L. R., 1 Q. B. 328.

“these points, as well in destroying as in maintaining.”¹ Lord Holt again says, that commissions of sewers to defend the sea were very ancient, and, even in some cases, by special prescription; but that sewers for melioration of land were by Act of Parliament.²

It was pointed out in the chapter already alluded to,³ that the powers of commissioners of sewers are derived from the statutes 6 Hen. VI. c. 5, and, more particularly, from the Act of 23 Hen. VIII. c. 5, which was known as the Bill of Sewers. It will also be remembered that the principal subjects under the jurisdiction of commissions issued under the latter enactment, which was modified and amended by subsequent Acts,⁴ were—1. Sea walls and such like defences; 2. Bridges, trenches, mills, and other things incident to river conservancy, which might in some case prove obstructions; 3. Navigable rivers; 4. Watercourses, streams and pools; and 5. Sewers and gutters. With regard to these, their duty was to maintain such as were useful, and to remove nuisances, while the commissions were temporary in their nature and all amenable to the Crown.

Duties and powers of commissioners.

Modern requirements, however, have led to great changes in the nature of these commissions, the inconvenience of the temporary duration of which was soon felt.

Not only are commissions of sewers, when once issued, to be now deemed to continue until such time as they may be superseded by the Crown, and their ordinances made indefeasible, until set aside by subsequent Courts of Sewers;⁵ but many of their functions have been transferred by legislation to various bodies of modern growth.

Thus, their jurisdiction with regard to sewers (using the word in its ordinary sense), drains and nuisances, has been

Now vested in sanitary authorities

¹ 10 Rep. 143; Woolrych, 5.

² *The Will of Shandrigany v. The Will of Sholedam*, 12 Mod. 331; Holt's Cases, 643; Woolrych, 3; cf. *Hudson v. Tabor*, 2 C. P. D. 290 (C. A.); and see *ante*, Chap. I., p. 24.

³ See Chap. I., p. 24.

⁴ *Inter alia* of such amending Acts may be noted—13 Eliz. c. 9; 3 & 4 Will. IV. c. 22; 24 & 25 Vict. c. 133, s. 14.

⁵ Sect. 14 of 24 & 25 Vict. c. 133.

transferred by a series of enactments¹ to the Metropolitan Board of Works and various sanitary authorities as regards the metropolis; while, with respect to the rest of the kingdom, it has been delegated to the Local Government Board, and other authorities of a like nature.

or inclosures
commis-
sioners,

With respect to watercourses, streams and pools, the authority of commissions of sewers has also been vested, so far as the drainage and the improvement of land are connected therewith, in the inclosure commissioners,² who, in addition to their functions under other statutes, are appointed commissioners³ for carrying into execution *The Improvement of Land Act*, 1864 (27 & 28 Vict. c. 114), in which the term improvement of land, for which the commissioners are authorized to advance money, is defined⁴ to comprise, *inter alia*, the following works:—

1. The drainage of land, straightening, widening, deepening, or otherwise improving drains, streams, and watercourses of any land:

2. The irrigation and warping of land:

3. The embanking and weiring of land from the sea and tidal waters, or from lakes, rivers, or streams, in a permanent manner:

* * * * *

10. The construction of engine houses, water-wheels, saw and water mills, &c., conduits, watercourses, bridges,

¹ The principal Acts relating to *sanitary matters in the metropolis*, are—11 & 12 Vict. c. 112; 12 & 13 Vict. c. 93; 18 & 19 Vict. c. 120; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102; 35 & 36 Vict. c. 79 (*Public Health Act*, 1872), s. 57; 38 & 39 Vict. c. 55 (*Public Health Act*, 1875), ss. 108, 115, 291. The principal Acts relating to *sanitary matters in England, exclusive of the metropolis*, are—11 & 12 Vict. c. 63; 18 & 19 Vict. c. 116; 21 & 22 Vict. c. 97; 21 & 22 Vict. c. 98; 28 & 29 Vict. c. 75; 30 & 31 Vict. c. 113; 34 & 35 Vict. c. 70 (*The Local Government Board Act*, 1871); 38 & 39 Vict. c. 55 (*Public Health Act*, 1875); 38 & 39 Vict. c. 31, and 39 & 40 Vict. c. 31 (*The Public*

Works Loans Acts, 1875 and 1876).

² The principal statutes on this point are—10 & 11 Vict. c. 38 (*Drainage Act*, 1847), which incorporates the powers of 8 & 9 Vict. c. 118 (*An Act to facilitate the Improvement and Inclosure of Commons*); 24 & 25 Vict. c. 133 (*Land Drainage Act*, 1861); 27 & 28 Vict. c. 114 (*Improvement of Land Act*, 1864), which refers to and recites 12 & 13 Vict. c. 100 (*Private Money Drainage Act*, 1849); 19 & 20 Vict. c. 9, as well as 1 & 2 Will. 4, c. 33; and 5 & 6 Vict. c. 89, which relate to land improvement in Ireland.

³ By sect. 2.

⁴ By sect. 9.

weirs, sluices, flood-gates, &c. which will increase the value of lands for agricultural purposes:

11. The construction or improvement of jetties or land places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep and other agricultural stock and produce, of lime, manure and other articles and things for agricultural purposes; provided that the commissioners shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof: and

12. The erection of all such works as in the judgment of the commissioners may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof.

Lastly, the powers of commissioners of sewers over navigable rivers have now devolved almost entirely on various conservancy boards created by statute for each particular river.¹ or in conservancy boards.

Since, therefore, commissioners of sewers may be created by Act of Parliament, independently of any general commission,² it may be apparently laid down, that whenever the legislature authorizes a body of persons, and constitutes them a body corporate, in order to deal with matters properly under the control of commissioners of sewers, such body is constituted thereby a commission, unless there is a stipulation to the contrary in their particular Act.

Thus the Bristol Dock Company were not only authorized to make sewers, but had also considerable powers entrusted to them to enable them to carry out the duties imposed on them;³ and it appears to be customary to Conservancy boards have all the powers of commissioners of sewers.

¹ See 21 Jac. I. c. 32; 24 Geo. III. c. 8, and more fully *post*, p. 450 and p. 459, note (³).

² Woolrych, 49.

³ 6 B. & C. 181. The company were empowered by their Act to make a floating harbour at Bristol, and it was also enacted "that it should and might be lawful for

" the directors of the Bristol Dock Company, and they were thereby
" authorized and required to make
" a common sewer in a certain
" direction therein specified, and
" also to alter and reconstruct all
" or any of the sewers of the said
" city at the mouth thereof, so and
" in such manner that the sewers

insert clauses in modern Acts of Parliament to preserve entire the rights of various commissions of sewers. So sect. 61 of 3 & 4 *Will. IV. c. 22*, provides that the Act shall not interfere with any navigable river, canal, port, or harbour under the management or power of any commissioners, trustees, or proprietors by virtue of any local or private Act of Parliament; sect. 72 of 21 & 22 *Vict. c. 98*, empowers any corporation, &c., authorized under an Act of Parliament to navigate on any river, canal, or harbour, &c., and to alter sewers, providing others at their own expense; and sect. 68 of the same Act (*The Local Government Act*, 1858) enacts that the Local Board shall not interfere with any rivers, canals, harbours, docks, &c., so as injuriously to affect the navigation thereon or the use thereof, or interfere with any towing path so as to interrupt the traffic thereof, in cases where any corporation, company, commissioners, conservators, &c., or individuals, are by virtue of any Act of Parliament entitled to navigate on or use such river, canal, dock, or harbour, &c., or to take tolls for its use.¹

Conservancy
of the
Thames.

As early as the reign of Ric. II. the conservancy of the Thames was entrusted to the mayor and corporation of London by the statute 17 *Ric. II. c. 9*,² and by 9 *Hen. VI.*

“might be discharged considerably
“under the surface of the water
“in the floating harbour, and
“also to make such other alterations and amendments in the sewers
“of the said city as might or should
“be necessary in consequence of
“the floating of the said harbour.”
The directors altered several sewers so as to discharge them considerably under the surface of the water in the floating harbour; but the sewage there discharged was so offensive as to be a nuisance to the neighbourhood. Held that under the latter part of the clause above set forth, the directors were authorized and required to make a new sewer if necessary to remove the nuisance. It was also held that a writ of *mandamus* commanding the directors

“to make such alterations and
“amendments in the sewers as
“were necessary in consequence
“of the floating of the said harbour,” was in the proper form; and that it was neither requisite nor proper to call upon the company to make any specific alteration, the mode of remedying the evil being left to their discretion by the Act of Parliament.

¹ See Woolrych, *Law of Sewers*, 3rd ed. (1864), pp. 49—53. See, too, sect. 62 of 3 & 4 *Will. 4*, c. 22; sects. 15, 16, 17, and 18 of 4 & 5 *Vict. c. 45*; sect. 18 of 10 & 11 *Vict. c. 38*; sect. 43 of 11 & 12 *Vict. c. 63*; and sects. 54, 55, 57, 60 of 24 & 25 *Vict. c. 133*.

² Hale, *de Jure Maris*, Harg. Tracts, p. 23.

c. 9, the Chancellor of England was empowered to grant his commission to certain persons to scour and amend the river Ley, in the counties of Essex, Hertford and Middlesex.¹

The obstruction of water channels made from time to time, for public or private convenience, was a grievous offence punishable by action or indictment, according to the nature of the wrong;² and, among the reasons assigned by sect. 1 of 23 *Hen. VIII. c. 5*, for the appointment of the commissioners of sewers, are "the overflowings . . . of land waters and springs upon meadows, pastures and other places," and "the obstructions created by mills, mill-dams, weirs, &c. . . upon rivers and watercourses."³ The Commissioners of Sewers had, therefore, powers of removing obstructions in navigable rivers; though it appears according to Woolrych that they have no power to improve the navigation of a river, or to make a river navigable, which was not so before, and that their power has never been extended beyond the removal of existing obstructions, or, at the most, the erection of new defences, which might in some degree be beneficial to the traffic.⁴

¹ This Act recites 23 *Edw. 3*, stat. 4; 1 *Hen. 5*, c. 2, and 3 *Hen. 6*, c. 5, the latter statute being enacted for the improvement of the navigation of the sea. By an Act of the same reign, 9 *Hen. 6*, c. 5, "all men shall have free passage in Severn with goods, chattels, &c."—a slightly different species of conservancy. It recites that the river of Severn is common to all the king's liege people, &c.; that divers Welshmen and others persons "arrayed in manner of war," have destroyed boats, &c., and thereby injured navigation; and that, therefore, it is ordained (s. 3) by authority of Parliament that the said liege people of the king may have and enjoy their free passage in the said river, &c., without disturbance of any, &c.; parties aggrieved to have action, according to the course of the com-

mon law (sect. 4). Further provisions on the same subject is made by 19 *Hen. 7*, c. 18; and 23 *Hen. 8*, c. 12.

² Woolrych on Sewers, 1, 2; Callis, 80; cf. *Hudson v. Tabor*, 2 C. P. D. 290 (C. A.).

³ See *ante*, Chap. I. p. 25.

⁴ Woolrych on Sewers, p. 125. Rivers are placed under the jurisdiction of the commissioners by sects. 2, 3, and, according to the definition of a river given by Sergeant Callis (p. 77) in his work on Sewers, all rivers would seem to be meant. Modern decisions however appear to have limited the term to such as "are necessary to or useful in navigation" (*Yeaw v. Holland*, 2 Sir W. Blackstone, 717; and per Buller, J., in *Dore v. Gray*, 2 T. R. 365. See *ante*, Chap. I. p. 25.

Powers of commissioners of sewers and conservancy boards to remove obstructions.

In progress of time, we find that the conservancy of nearly all the rivers, ports and harbours in England, was gradually placed in the hands of corporate bodies so constituted by Act of Parliament, and exercising the functions of permanent commissions of sewers; though it would appear that the authority of the Commissioners of Sewers over such bodies may still be retained, if provision to that effect is expressly made in the Act incorporating them.¹ The conservators of the various rivers of this country, therefore, perform in a fuller manner a portion of the duties originally devolving on the Commissioners of Sewers. A general definition of the scope of their powers may be to some extent drawn from the remarks of Cairns, L. C., with regard to the functions of the Conservators of the Thames in *Cory v. Bristowe*.² “The conservators of the Thames, under the Act of 1857,³ are made the guardians, as it were, of the navigation of the Thames, and the protectors of the bed and soil of the Thames, for the purposes of navigation. They have certain powers for making bye-laws to protect the navigation,—they have powers to make piers and landing places for the accommodation of the public,—they have powers to authorize riparian owners to make landing places, wharves and jetties, and to put down mooring chains, and moorings for the better and more convenient enjoyment and access to their lands.”

Statutes relating to navigation of inland waters are of three kinds.

The statutes relating to inland water navigation are of three kinds:—1st, such as restore or improve the navigation of rivers formerly navigable; 2nd, such as make rivers navigable which originally were not so; and, 3rd, such as provide for the construction of an inland navigation or canal. Under the first two classes of Acts the care and conservancy of a river is vested in commissioners, the mayor and burgesses of a town, or some other body corporate. Powers are given them to dredge, cleanse, and

¹ See Woolrych on Sewers, p. 49, and *ante*, Chap. I. p. 26.

² L. R., 2 App. Cas. 262.

³ 20 & 21 Vict. c. 147.

scour the bed of the stream, and generally to keep it navigable; to make and enforce bye-laws regulating the navigation; to remove obstructions, and, where necessary, to enter on to lands, making compensation for interests injured by their acts.¹

By the Thames Conservancy Acts, the soil of the bed of that river up to high water mark, which had long been the subject of dispute between the Crown and the Corporation of the City of London, is vested in the latter body, who in their turn convey all their interest and title therein to the conservators appointed by the Act.² But it has been held that where a river or navigation has been by Act of Parliament vested in a Board of Conservators for the purposes of navigation, if the words of the Act are applicable to the acquisition by the conservators of the right or easement of passage only, and where the acquisition of the soil of the river and its banks is not necessary for the purposes of the Act, the ownership of the soil must be taken not to pass—the Courts not being inclined to infer that a statute of this kind gives more than such a use of the soil as is necessary for the purposes of navigation.³ Where the words of the Act amount to a statutable conveyance of the soil upon which the navi-

Soil of rivers not generally vested in conservators by their Act.

¹ 16 & 17 Car. 2, c. 12 (Avon (Hampshire) Navigation); 24 Geo. 2, c. 39 (Avon (Warwickshire) navigation); 24 Geo. 2, c. 19 (Nar navigation); 21 Jae. 1, c. 3; 24 Geo. 2, c. 28; 15 Geo. 3, c. 4 (Upper Thames navigation); 23 Geo. 3, c. 48 (Trent navigation); 2 & 3 Vict. c. 61 (Shannon navigation); 31 & 32 Vict. c. cliv. (Lee navigation). The only difference between rivers of which the navigation is restored, and those which are made navigable for the first time, is, that in the latter the rights of the conservators, as against the public are greater, owing to the fact that none of the rights subsisting in a navigable river can attach thereto (*Hargreaves v. Diddams*, L. R., 10 Q. B. 582; *Musset v. Burch*, 35 L. T., N. S.

486; *Reg. v. Betts*, 16 Q. B. 1022).

² 20 & 21 Vict. c. cxlvii; see *Cory v. Bristow*, 2 App. Cas. 262, and cases *ante*, Chap. II. p. 80.

³ *River Lee Conservancy v. Button*, 12 Ch. D. 383; *Badger v. Yorkshire Railway*, 5 Jur., N. S. 409; *Hollis v. Goldfinch*, 1 B. & C. 206; see also *R. v. Aire and Calder*, 9 B. & C. 820; *R. v. Mersey and Irwell*, 9 B. & C. 95; *R. v. Thomas*, 9 B. & C. 114; *Chelsea Water Co. v. Bowley*, 17 Q. B. 358; *Doe d. The Queen v. Archbishop of York*, 14 Q. B. 81; *Doe d. Patrick v. Beaufort*, 6 Ex. 498; *Somerset Canal v. Harcourt*, 2 De G. & J. 596; *Robinson v. Warwick*, 2 Bing. N. C. 488; *Harrowbrough v. Shadlow*, 7 M. & W. 37; *Dimes v. Grand Junction Canal*, 3 H. L. 794; *Simpson v. Staffordshire Water Co.*, 4 De G. & J. 679.

gation is constructed, the land used for the works has been held to vest in the navigation company without any conveyance.¹

Where an Act for making the river Tone navigable named thirty persons and their successors as conservators, and provided that lands taken were to vest in them and their successors, and that land might be conveyed to them and their successors, &c.:—Held, that as it was the manifest intention that the conservators should take land by succession, and not by inheritance, although they were not created a corporation by express words, they were so by implication, and might sue in their corporate name for injury done to their real property.²

Conservators
not liable for
damage
caused to ad-
joining lands
in the absence
of negligence.

There appears to be no liability at common law on the owner of the bed of a navigable river to keep the channel clear of natural obstructions, such as the silting up of the channel, or the growth of weeds.³ It has, moreover, been held that where the navigation of a river is vested in a body of conservators for the purposes of navigation only, no action will lie against them for damage done by overflow of the river caused by natural obstructions in it, although tolls are taken for the use of the navigation. The only duties cast on them are to protect the navigation, and they are not charged with any liability in respect of matters not essential to the improvement of the navigation. Thus, in *The Parrett Navigation Co. v. Robins*,⁴ a navigation company was held not liable to the Court of Sewers for not cutting weeds in the river, which were beneficial to the navigation, though injurious to the adjoining landowners—although they took tolls for the navigation. So in *Hodgson v. Mayor of York*,⁵ where the plaintiffs were authorized to abandon a river navigation, and did so, making alterations authorized by the Act, the

¹ *Bruce v. Willis*, 11 A. & E. 463; see also *R. v. Mersey and Irwell*, 9 B. & C. 95; *R. v. Thomas*, 9 B. & C. 114.

² *Conservators of the Tone v. Somerset*, 10 B. & C. 349.

³ *Hodgson v. Mayor of York*, 28 L. T., N. S. 836; *Bridge's case*, 13 Rep. 33; see also *Forbes v. Lee Conservancy*, 4 Ex. D. 116.

⁴ 10 M. & W. 593.

⁵ 28 L. T., N. S. 836.

effect of which was that if the channel remained in the state they left it in, due provision was made for the escape of the water—but they took no measures to prevent the channel from silting up,—it was held that they were not responsible for damage caused by the silting up of the channel or growth of weeds causing damage to adjoining proprietors.

In *Cracknell v. Mayor and Corporation of Thetford*,¹ the defendants were empowered by a private Act of Parliament to render navigable the river Brandon, and to take tolls for the purpose of repaying the necessary expense; and in the exercise of their power under the Act they erected staunches in the river, the result of which, combined with the natural growth of the weeds in the river, and the accumulation of silt against the staunches, was that the river overflowed its banks and damaged the plaintiff's land. It was held that there was no obligation on the defendants to cut the weeds or dredge the silt unless it was necessary to do so for the benefit of the navigation; and that the plaintiff's remedy, if any, was not by action against them for not doing so, but by applying for compensation under the Act.

In support of the plaintiff the cases of *Whitehouse v. Fellowes*,² *Mersey Dock Trustees v. Gibbs*,³ and *Bagnal v. London and North Western Railway*,⁴ were cited as well as *Fletcher v. Rylands*⁵ and *Groucott v. Williams*.⁶ The Court, however, held, that none of these cases applied; Brett, J., saying, "I think this case is clearly within the " authority of *Parrett Navigation v. Robins*,⁷ and distin- " guishable from those in which it has been held that, if a " man elects to do an act on his own land, he must take " care that he does it so as not to cause damage to his

¹ L. R., 4 C. P. 629. See remarks on this case by Lord Hatherley in *Geddis v. Bann Reservoir*, 3 App. Cas. 430, ante, Ch. V. p. 267.

² 10 C. B., N. S. 765; 30 L. J., C. P. 305.

³ L. R., 1 H. L. 93.

⁴ 7 H. & N. 423; 31 L. J., Ex. 480.

⁵ L. R., 1 Ex. 265.

⁶ 4 B. & S. 149; 32 L. J., Q. B. 237.

⁷ 10 M. & W. 593.

“neighbours. Here the defendants are not owners of the land, and they have only done acts which they were authorized to do. I think, therefore, the plaintiff’s only remedy, if any, is for compensation under the Act.” “In order to enable the plaintiff to maintain this action,” said Bovill, C. J., “there must be shown some duty or obligation on the defendants which they have omitted or neglected, or in the performance of which they mis-conducted themselves or acted negligently; and that by reason of their negligence damage has accrued to the plaintiff. It seems to me that no such conduct on the part of the defendants has been made out.”¹

Conservators not bound at common law to keep the navigation in proper repair, but so long as they keep it open and take tolls, they are bound to use reasonable care.

Parnaby v. Lancaster Canal.

It would seem, also, that at common law, independent of statute, neither the owners of a navigation or board of conservators are bound to keep the navigation open or in a proper state of repair, but that so long as they choose to keep it open and take tolls for its use, even where such tolls are not for their own profit, but solely for the maintenance of the navigation, they are under an obligation to take reasonable care that persons using it are exposed to no undue danger.² Thus, in *Parnaby v. Lancaster Canal*,³ the Court of Exchequer Chamber held, affirming the Court of Queen’s Bench, that a canal company were liable at common law for damage caused by a sunken boat which they had failed to weigh up or mark by light or signal,

¹ Under the river Weaver Navigation Acts, persons who sustain damage by reason of the navigation are entitled to compensation. In *Reg. v. Delamere* (13 W. R. 757), the defendants had under their control a lock, weir and elows, through which, when raised, the water could be let off. During a flood they kept down the elows, and by so penning back the water caused the premises of plaintiff to be damaged, and the plaintiff was held entitled to compensation; for although it was not shown that his premises would not have been flooded in the same way if the river had never been altered, still

the proximate cause of the damage, viz., the penning back, being a thing done on account of the navigation—the trustees were as much liable as if it had been a breach of duty, and it was no excuse that it was done skilfully, and that unless it had been done, other lands would have been damaged.

² *Parnaby v. Lancaster Canal*, 11 A. & E. 223; see *ante*, Ch. V. p. 299; *Mersey Docks v. Gibbs*, L. R., 1 H. L. 93; *Winch v. Conservators of Thames*, L. R., 9 C. P. 378; L. R., 7 C. P. 458; see also *Brownlow v. Metropolitan Board of Works*, 13 C. B., N. S. 768.

³ 11 A. & E. 223.

independent of any statutory clause enabling them so to weigh up sunken boats—on the principle that the owners of a canal taking toll for the navigation are bound to take reasonable care in making the navigation secure.

In *Mersey Docks v. Gibbs*,¹ the House of Lords held *Mersey Docks v. Gibbs.* that this principle applied to a private person or company taking tolls for the use of statutory works, even where such tolls were not applicable to the use of the individual or company, but were to be devoted to the maintenance of the works; and that the Mersey Docks Company were responsible for damage caused to a ship which, on entering the dock, struck on a mud bank which the defendants neglected to remove. Their lordships held further, that if knowledge of the existence of a cause of mischief make persons responsible for an injury, they will be equally responsible where, by their culpable negligence, its existence is not known to them.

In the case of *Winch v. The Conservators of the Thames*,² *Winch v. The Conservators of the Thames.* an action was brought by the plaintiff for damages for the loss of some horses which were drowned while towing a barge on the river Thames above high water mark, in consequence of a part of the towing path being out of repair. The defendants, the Conservators of the Thames, were a corporate body in whom were vested by *The Thames Navigation Act*, 1866 (29 & 30 Vict. c. 89), certain powers for the preservation and improvement of the stream. It appeared from earlier statutes that there were originally towing paths on the river banks, the owners of which took tolls for the right of passing along them, and that the defendants had acquired powers of supervising and controlling the towing paths and regulating the tolls. They subsequently acquired powers to purchase and take lands compulsorily, and to execute works for the purposes of the navigation, and to take tolls for the use of the towing paths purchased or hired by them, and to apply their

¹ L. R., 1 H. L. 93.

² L. R., 9 C. P. 378; L. R., 7 C. P. 456.

funds to the repair of the works vested in or acquired or constructed by them under their various Acts. The defendants had, in pursuance of the above powers, made a parol arrangement with the owner of the soil of the towing path, at the place in question, for the use of such towing path at a yearly rent. Some parts of the towing path along the river had been specially constructed by and belonged to the defendants, and the use of the whole of the remainder had been acquired by them. They took an aggregate toll for the use of the whole of the navigation and towing path at Teddington Lock. The Court of Exchequer Chamber held, affirming the decision of the Court of Common Pleas, that the defendants were liable.

The judgment of the Court, read by Bramwell, B., is as follows¹:—"The defendants' rule in this case "was to enter a verdict for them on the ground 'that " 'there was no evidence that they were bound to repair the spot where the accident happened.' If this "were the question in the case, it might be difficult to "answer it adversely to the defendants—and say that "they were bound to repair the spot in question. For "undoubtedly when the towing paths were in the hands "of, and the tolls were taken by private owners, there was "no such obligation, and none is imposed by the statutes "in express terms on the defendants; and it may be, that "if the defendants, as a matter of judicious use of their "funds, might think it inexpedient to be at what might "be the enormous and unprofitable expense of repairing "long extents of towing paths where there was scarcely "any traffic, there is no power of compelling them, or "they would not be compelled to such enormous outlay. "We do not go further into this question, as we think it "is not the question; but we refer to the judgment in "*Mersey Docks v. Gibbs*.² But we think it is enough to

¹ L. R., 9 C. P. p. 387; see also the judgment of the Court below, L. R., 7 C. P. p. 462, where the

statutes and cases are discussed at length.

² L. R., 1 H. L. 93.

“ support this verdict, if the defendants were, so long
 “ as they kept the towing path open and took tolls for its
 “ use, under an obligation to those whom they invited to
 “ use it, to take reasonable care to see that the towing
 “ path was in such a state as not to expose those using it
 “ to undue danger. If the dangerous state of the path at
 “ the spot had been latent, so that the defendants, though
 “ using reasonable care, remained ignorant of it, or if,
 “ having found it out, they had warned the plaintiffs of
 “ it, they would not have neglected this duty; but, as it
 “ is, if such were the duty of the defendants, the finding
 “ of the jury (which we must here take to be correct)
 “ is, that they have neglected it. We agree with the
 “ Court below in thinking that since the case of *Mersey*
 “ *Docks v. Gibbs*,¹ we must hold the funds of this corpora-
 “ tion (although established for public purposes) liable to
 “ make good the damages sustained by a private person
 “ from any breach of duty on their part,² and that there
 “ is nothing in these statutes to exempt this corporation
 “ from the duties which the common law would cast upon
 “ a private person or trading corporation who maintained
 “ a similar towing path along a public navigation, and
 “ levied tolls for its use. And we think that *Parnaby v.*
 “ *Lancaster Canal Co.* and *Mersey Docks v. Gibbs* establish
 “ that such a duty is by common law cast upon those who
 “ invite persons to use a towing path like this, and receive
 “ pay for the use of it. It was argued that these cases
 “ were not applicable, because the part of the towing path
 “ where the accident happened was on the natural soil,
 “ only worn into a track made by the horses’ feet leading
 “ from a bridge over one ditch to a bridge over another;
 “ and it was argued that the common law only imposed
 “ this duty on those who maintained artificial works, such

¹ L. R., 1 H. L. 93.

² As to this, see also *Itchin v. Southampton*, 8 E. & B. 301; *Ward v. Lee*, 7 E. & B. 426; *Clothier v. Webster*, 12 C. B., N. S. 790; *Ruck*

v. Williams, 3 H. & N. 308; *Whitehouse v. Fellows*, 10 C. B., N. S. 765; *Brownlow v. Metropolitan Board*, 16 C. B., N. S. 546; 13 C. B., N. S. 768.

“ as canals, or docks, or bridges. We wish to guard
 “ against being supposed to decide that in every case
 “ where a licence is given for money to go over land in its
 “ natural state, this obligation results. Much may depend
 “ on the circumstances of each case. But we think that in
 “ this case, where persons pay one toll for the use of one
 “ entire towing path, parts of which are artificial and
 “ parts not, there can be no distinction made as to the
 “ duty of those who maintain the parts to take reasonable
 “ care of the artificial and the natural parts, or at least
 “ to warn those who are there of defects in them. The
 “ defendants can in future, if they think fit, announce to
 “ those who pay the tolls that they must take the paths
 “ as they find them. If this is done, there could be no
 “ liability for a defective state of repair, even though
 “ wilful. Whether if they gave such notice, and left the
 “ banks unrepaired, they could be compelled to repair
 “ them, is a question that could then be directly raised
 “ and decided.”

*Forbes v. Lee
 Conservancy.*

In a subsequent case,¹ it has been held by Pollock, B., that where the defendants, an unpaid body of trustees for the river Lee, were expressly forbidden to take any tolls for such part of their navigation as lay between Bow Creek and Old Ford Lock,—this part being an ancient navigable river,—no duty was imposed upon them to remove obstructions in that part of the navigation; and that, consequently, the plaintiff, owner of a barge which was injured by striking on some submerged piles there, could not recover damages, although the jury found that the piles were dangerous, and that the defendants ought to have been aware of the danger, and had neglected their duty.

Canals.

The third class of statutes, those relating to canals, are nearly identical as far as the preservation of navigation, and compensation to persons injured by their works, are concerned, but the undertakers are bound, in most cases,

¹ *Forbes v. Lee Conservancy*, 4 Ex. D. 116.

to construct the canal in accordance with plans approved by and deposited with the Admiralty, the Board of Trade, or some other competent authority, and the public being only entitled to navigate its waters on payment of tolls, the regulations on the latter head are more stringent and detailed.¹

The duties of the owners of canals, which are in general artificial erections, or excavations on the land of others, will be necessarily larger than those of river conservators as to liability for the escape of water. This subject, however, has been fully treated of in another chapter.²

It is hardly necessary to say, that it would be impossible to state at length the provisions of the numerous River Conservancy Acts³ now in force, and on which the rights

¹ See 43 Geo. III. c. 102 (Caledonian Canal); 33 Geo. III. c. 80 (Grand Junction Canal); 32 Geo. III. c. 102 (Canal from Pont Newydd to the Usk).

² *Ante*, Ch. V.

³ A consideration of the following extracts from a few of the Acts relating to conservancy, will serve to indicate the general nature of their provisions.

I. *Rivers* (made navigable).

16 & 17 Car. II. c. 12.

"An Act for making the river of Avon navigable from Christ-church in the city of New Sarum."

Commissioners to be appointed for making the river navigable. Satisfaction to parties endamaged in any of their lands. Commissioners empowered to compound with persons so damnified. The powers of the said commissioners defined. How commissioners dying or renouncing may be supplied. The powers to make orders and constitutions, and to impose penalties on the breakers. Persons grieved may apply to the justices of assize. The undertakers to have the taxes upon carts, carriages, &c. Penalties, and how to

recover the same. Drawing and haling of barges, &c. upon the banks provided for. No wharf to be within New Sarum. The river, havens, &c. to be under the survey of the undertakers and commissioners. Persons sued for action upon this Act may plead the general issue.

Among the private Acts of the same year are:—"An Act to enable Henry Lord Loughborough to make the river and sewer navigable from or near *Bristowe Causey*, in the county of Surrey, to the river Thames;" "An Act for making the river of Medway navigable in the counties of Kent and Sussex;" "An Act for making divers rivers navigable or otherwise passable for boats, barges, and other vessels."

31 Geo. III. c. 66, is "An Act to enable the Earl of Egremont to make and maintain the river Rother navigable from the town of Midhurst, in a certain meadow called the Railed Pieces or Stopham meadow in the parish of Stopham, and a navigable cut from the said river to the river Usk, at or near Stopham bridge, in the county of Essex, and for other purposes."

II. *Rivers* (navigation improved).2 & 3 *Vict. c. 61.*23 *Geo. 3, c. 48.*

An Act for improving the navigation of the river Trent from a place called Wilden Hay, in the counties of Derby and Leicester or one of them, to Gainsborough, in the county of Lincoln; and for empowering persons navigating vessels thereon to hale the same with horses.

Recites 10 & 11 Will. III. c. 20 (An Act for making and keeping the river Trent, in the counties of Leicester, Derby and Stafford, navigable), that the navigation would be expedited if power were given to "hale with horses boats, barges, keels, and other vessels navigated upon the said river," which now are haled on by men; and that several persons, herein-after particularly named, are desirous of making and maintaining the navigation at their own costs.

It therefore appoints and incorporates the undertakers, and describes the manner in which the navigation shall be made.

No weirs or dams to be made across or in the river, so as to prejudice fisheries, or obstruct the passages of salmon or other fish. Communications between the river Trent and other navigations to be preserved. Lands may be entered to take surveys. Commissioners may lower fords to 24 inches if necessary, and ferry boats are to be provided at the fords. Haling paths to be made pursuant to the plans. Bodies politic empowered to sell lands. Conveyances to be enrolled, and true copies to be allowed to be evidence. Provisions are made for the raising of money, allotment of shares, and levying of tolls, from which materials for roads and manure for land are to be free, as are pleasure boats. Tolls may be lessened, and may be free from taxes. River not to be under commissioners of sewers. Persons haling, &c. committing any trespass to be subject to penalties.

"An Act for the improvement of the navigation of the river Shannon" (1839).

Sect. 1 recites 5 & 6 Will. IV. c. 67, whereby it was enacted, that commissioners should be appointed by her Majesty's Treasury for the purpose of ascertaining the works necessary for the improvement of the said navigation, and for making an estimate of the expense thereof; and enacts, the works described in the plans and reports of the commissioners shall be carried into effect.

Commissioners may make contracts for works (sect. 16); and are to lay their accounts before Parliament (sect. 18). Where they have doubts as to the legality of mills, &c., they may apply to Court of Chancery or Exchequer to direct proceedings to ascertain legality (sect. 21), and may abate nuisances, such as mills, milldams, weirs, &c. By sect. 37, the care and conservancy of the river, and of such rivers as flow into it, is vested in the commissioners. No weirs or other obstructions shall be placed in the navigation without their consent (sect. 38); and they shall cause the limits of the river to be defined (sect. 39); and surveys and maps of the mills and all weirs and dams thereon, to be made (sect. 40). They may erect beacons and lighthouses (sect. 41). By sect. 42 it is enacted, "That the commissioners for the execution of this Act shall have full power to widen or deepen, cleanse, clear or scour, open or straighten, and to remove all obstructions in the opinion of the said commissioners injurious to the navigation thereof respectively, from the said river Shannon, or any of the canals or rivers aforesaid, by any ways or means which to them shall seem expedient; and to make or erect in or on the said river, or in or on any of the rivers aforesaid, or upon the lands adjoining or contiguous to the same, or any of them, such

"and so many weirs, dams or engines, landing places, or other matters or things for the purpose of improving the navigation of the said river, or any of the rivers aforesaid, &c." They may sell or demise lands, mill sites, &c. (sect. 44); take tolls, &c. (sects. 45, 47); and fix rates of wharfage and quays (sect. 48). They may make bye-laws (sect. 56), copies of which are to be evidence.

[37 & 38 *Vict. c. 60* (1874), in some respects amends this Act, and is incorporated with it. By sect. 1, the Acts of 1835, 1839, 1846 and 1874, may be cited as the Shannon Acts, 1835 to 1874.]

13 & 14 *Vict. c. lxxiii.*

"The Tyne Improvement Act, 1850."

Sect. 34. "The commissioners from time to time, if and when they deem it necessary or expedient, may build, purchase, hire, and employ such vessels to be worked by steam or otherwise, at their discretion, for dredging, scouring, cleansing and deepening the bed of the river as far as they lawfully can or may, and such other vessels and machinery to be used for any other of the purposes of this Act as they think fit, and may use such vessels accordingly."

Sect. 35. They are to cause maps of the port, showing shoals, banks, levels of high and low water, quays, wharfs, to be made and deposited in their office, and open to inspection.

31 & 32 *Vict. c. cliv.*

"Lee Conservancy Act, 1868."

Recites that a large proportion of the water supplied to the metropolis is drawn from the Lee, and the Lee is extensively used for purposes of navigation, and for these and other reasons the preservation of the purity of the water of the Lee and its tributaries, and the improvement of the stream, bed, and banks thereof, and the maintenance and improvement of

the cuts, locks, and other navigation works on the Lee, are objects of great public and local importance; that there is not any existing authority with sufficient powers for effecting such preservation, maintenance, and improvement in all respects, and it is expedient that a new body of conservators, with adequate powers, be constituted for that purpose, and that under the Lee Navigation Improvement Act, 1850 (13 & 14 *Vict. c. cix*, an Act to alter and amend the Acts relating to the navigation of the river Lee in the counties of Hertford, Essex, and Middlesex; and to enable the trustees further to improve the navigation, and to dispose of the surplus water, and for other purposes), and the Acts therein recited, the management of the Lee, from the town of Hertford downwards (being so much thereof as is navigable), is intrusted to the body styled the Trustees of the River Lee; that it is expedient that the duties and powers of the trustees be transferred to the new body of conservators to be constituted, the trustees being formed into a constituency, and being represented in the new body by members thereof elected by them as in this Act provided; and that the new body should comprise representatives of the New River Company and the East London Waterworks Company (both which companies draw water for the metropolis from the Lee), and representatives of traders interested in the Lee, and of local and public authorities.

Sect. 3 describes the Lee and its tributaries; and sect. 4 sets limits to the conservancy of the Lee and the Thames; while sect. 5 incorporates the Lee Conservancy Board. Provisions are made for the preservation of the flow and purity of the river Lee (sect. 89), and for the prohibition of putting new sewage into it or its tributaries (sect. 91), and also for the discontinuance of existing sewerage works (sect. 92).

III. *Canals.*

33 *Geo. 3, c. 80* (Grand Junction Canal).

“An Act for making and maintaining a navigable canal, from the Oxford Canal navigation at Braunston, in the county of Northampton, to join the river Thames at or near Brentford, in the county of Middlesex; and also certain collateral cuts from the said intended canal.”

Recites the practicability and expediency of making the canal, and names the proprietors, and empowers them to carry out the work, which is to be styled The Grand Junction Canal. The grounds to be taken for canal and collateral cuts, and for the towing paths thereto, and the ditches and fences to separate such towing paths from the adjoining lands, not to exceed twenty yards in breadth, except in such places where any docks, basins, reservoirs, or pens of water shall be made, &c., &c. Line of canal to be guided by plans and books of reference, and no deviation of more than 100 yards from such plans and books of reference, &c. to be made without the consent of the land owners. Bodies politic empowered to sell and convey lands. Contracts and sales to be made at the expense of the company. Persons qualified, as required by the Act, appointed commissioners for settling and adjusting all questions and differences which may arise between the company of proprietors and the several persons interested in lands, tenements, mills, mines, waters, or premises which may be taken, used, affected, or prejudiced by the execution of the powers hereby granted. Powers of commissioners defined. They are to settle proportion of money to be paid to persons interested. Millers not unnecessarily to draw down the water of their mill streams, to the prejudice of the navigation. If the company deepen any stream,

they shall make good the damage to occupiers of mills thereon. Company to divert the water from mill streams for rebuilding and repairing any mill. Provisions for the apportionment of shares and the levying of rates of tonnage, power being given to alter rates, and exemptions from payment thereof being made in certain cases. Company may lease rates. Places to be made for boats to turn or to lie in, or for other boats to pass; and penalties are laid on persons overloading and obstructing the navigation, opening the locks, destroying the works, or doing other damage to the navigation. Vessels obstructing the navigation are to be removed, and vessels sunk to be weighed up.

The Act is amended and extended by 34 *Geo. III. c. 24, sect. 19* of which provides that the company shall be rated to all parochial and parliamentary taxes in respect of lands already purchased or taken, or to be purchased or taken, as well as for warehouses and other buildings, in the same proportion as other lands and buildings lying near the same are or shall be rated, and as the same lands, &c. would be rateable, if the property of individuals.

43 *Geo. III. c. 102* (Caledonian Canal).

An Act for granting to his Majesty the sum of 20,000*l.*, towards defraying the expense of making an inland navigation from the Eastern to the Western sea by Inverness and Fort William, and for taking the necessary steps to execute the same.

Commissioners are appointed (sects. 2, 3), who may construct harbours, docks, basins, &c. tide locks, piers, jetties, &c. (sect. 6); may fix the line of navigation, and contract for the purchase of lands necessary (sects. 6, 7). Bodies politic empowered to contract for the sale and conveyance of lands (sect. 8). Commissioners may set

and duties of each particular board depend,¹ and a fuller idea of their nature may perhaps be gained by a consideration of the Acts relating to the Thames, which may be presumed to offer the best example of a complete system of conservancy.

These Acts are—20 & 21 *Vict. c. clxvii* (*The Thames Conservancy Act, 1857*); 22 & 23 *Vict. c. xxxviii* (*The Watermen's and Lightermen's Amendment Act, 1859*); 27 & 28 *Vict. c. 113* (*The Thames Conservancy Act, 1864*); 29 & 30 *Vict. c. 89* (*The Thames Navigation Act, 1866*); 30 & 31 *Vict. c. ci* (*The Thames Conservancy Act, 1867*); and 33 & 34 *Vict. c. cxlix* (*The Thames Navigation Act, 1870*). Thames Conservancy Acts.

By the Thames Conservancy Act, 20 & 21 *Vict. c. clxvii* (amended by 27 & 28 *Vict. c. 113*), the right of the soil of the bed of the river up to high water mark, which had been the subject of dispute between the Crown and the Corporation of the City of London, is vested in the latter body.² In the case of *Lyon v. Fishmongers' Co.*,³ Lord Chancellor Cairns says: "The conservators of the Thames, " as your lordships well know, have, under the Act of " 1857, carried over to them all the rights in the bed and " soil of the river Thames which belonged to the Crown, " or which were claimed by the Corporation of London.⁴ " They are made the guardians, as it were, of the naviga-

out and make contracts for, and purchase lands, &c. necessary for harbours, &c. (sects. 10, 12), and may levy rates and duties (sect. 23), and may lease the same.

[Additional powers were given to the commissioners by 44 *Geo. III. c. 62*, and other Acts. By 39 *Geo. III. c. xxvii*, the Crinan Canal was authorized to be constructed; and by 11 & 12 *Vict. c. 54*, the commissioners of the Caledonian Canal are newly incorporated (sects. 1, 2), and both the Caledonian and Crinan Canals united and vested in them (sects. 4, 5)].

¹ As to the number of boards, see the Duke of Richmond's speech in the House of Lords, at the first reading of the Rivers Conservancy Bill, 7th March, 1879.

² The conservancy of the river Thames was vested in the Mayor and Corporation of London by 17 *Ric. II. c. 9*.

³ 1 App. Cas. 662.

⁴ As to liability of Corporation of London for money borrowed by them as conservators, after the passing of 20 & 21 *Vict. c. 147*, see *Brown v. Mayor of London*, 9 C. B., N. S. 726; 7 Jur., N. S. 729: affirmed on appeal, 13 C. B., N. S. 828.

“tion of the Thames, and the protectors of the bed and
 “soil of the Thames for the purposes of navigation.
 “They have certain powers—very large powers for
 “making bye-laws to protect the navigation; they have
 “power to make piers and landing places for the accommo-
 “dation of the public; and they have powers to authorize
 “riparian owners to make landing places, and wharves
 “and jetties, and to put down mooring chains and
 “moorings, for the better and more convenient enjoyment
 “of and access to their lands.” By sects. 36 to 47
 (amended by s. 31 of 27 & 28 Vict. c. 113), powers are
 given to conservators to make bye-laws for regulation of
 navigation.¹ The 53rd section of the Act of 20 & 21
Vict. c. cxlvii gives the conservators the power to license
 erections interfering with the navigation of the river, and
 owners of land on the banks have no right to complain if
 such erections do not deprive them of access to their land,
 but only interferes with the public right of navigation.²
 Where, however, such erections interfere with the right of
 access to or from a particular wharf, it is an unauthorized
 disturbance of the rights of property in the banks, which
 may be vindicated in damages or restrained by injunction.³

By sect. 45, penalties not exceeding 5*l.* may be imposed
 by bye-laws, and recovered before justices.

By sect. 105, no works on the bed or shores of the river
 below high water mark are to be executed under the direc-
 tion of, or with the sanction of, the conservators, without
 the same having been approved of by the admiralty.
 This section is repeated by sects. 27 and 28 of the
 Metropolis Main Drainage Act,⁴ and it has been held that
 the Metropolitan Board of Works have no power under
 sect. 135 of the Metropolis Management Act,⁵ to erect any

¹ See *post*, p. 471.

² *Kearns v. Cordwainers' Co.*, 28
L. J., N. S. 285.

³ *Lyon v. Fishmongers' Co.*, *L.*
R., 1 App. 662.

⁴ 21 & 22 Vict. c. 104; cf.
Brownlow v. Metropolitan Board of
Works, 13 C. B., N. S. 768.

⁵ 18 & 19 Vict. c. 120.

works on the bed or soil of the Thames without such leave, and that, therefore, they were liable for damage done to a vessel which grounded on a pile negligently placed on the foreshore by their contractor.¹

By sect. 65, amended by sects. 68 and 69 of 27 & 28 *Vict. c. 113*, tolls may be taken for use of piers and moorings.

By sect. 88, harbour masters may be appointed, to be approved by the Trinity House, who may regulate mooring and loading of vessels.²

By sect. 86, amended by sect. 27 of 33 & 34 *Vict. c. cxlix*, vessels sunk or stranded in the river, in case the master neglects to remove them, may after notice be raised and sold by the conservators to pay expenses.

By sect. 87, any obstruction may be removed.

By sect. 88, amended by sects. 50, 51 and 53 of 27 & 28 *Vict. c. 113*, the conservators are authorized exclusively to lay down buoys and beacons.

By sect. 96, owners are made accountable for damage done by vessels to the property of the conservators.

By sect. 98, amended by sects. 6 and 7 of 30 & 31 *Vict. c. ci*, and by sect. 29 of 33 & 34 *Vict. c. cxlix*, the conservators alone may dredge and cleanse the river, and remove mud banks, &c.

By sect. 101, no ballast, and by sect. 102, amended by sect. 74 of 27 & 28 *Vict. c. 113*, and by sects. 30—32 of 33 & 34 *Vict. c. cxlix*, no rubbish, earth, ashes, dirt, mud, soil, or other offensive matter, is to be thrown or allowed to flow into the river.

By sect. 111, extended by sect. 1 of 33 & 34 *Vict. c. cxlix*, *The Lands Clauses Consolidation Acts*, 1845—1869, are incorporated to enable the conservators to purchase lands.

¹ *Brownlow v. Metropolitan Board of Works*, 16 C. B., N. S. 546.

² This power vested in the conservators exclusively, anything in

Part VI. of the Merchant Shipping Act, 1854, or in any other Act, or in any charter or grant, notwithstanding.

By sect. 136, amended by sect. 33 of 33 & 34 *Vict. c. cxlix*, all tolls, tonnage, port and harbour dues, given or granted by Act of Parliament or otherwise to the Mayor and Commonalty of London, are to form a fund, called the Conservancy Fund, and to be applicable to the carrying out of the Act.

By later sections, nothing in the Act is to apply to her Majesty's ships, or to affect the rights of the Trinity House, Commissioners of Sewers, Metropolitan Board of Works, dock companies, &c., or the rights of the Crown in the Medway, or the trustees of the river Lee, and various private owners.

Watermen's
Acts.

The rules governing the large class of persons entitled to manage the navigation of barges and boats on the Thames are framed by the "Company of Watermen and "Lightermen," incorporated by sect. 4 of 7 & 8 *Geo. IV. c. lxxv*, which recites the various Acts relating to watermen, bargemen, wherry-men and lightermen, &c., and enacts that they shall henceforth be one body corporate by the name and style of the "Masters, Wardens, and "Commonalty of Watermen and Lightermen of the River "Thames."

The above statute was repealed by sect. 6 of "*The "Watermen's and Lightermen's Amendment Act, 1859*" (22 & 23 *Vict. c. cxxxiii*), but by sect. 7¹ it is provided that such repeal shall not affect—

1. The existence of the company or its property, whether real or personal, or any of its rights and obligations as a body corporate, except as altered by this Act.

2. Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation.

3. Any appointment or licence duly made or granted under enactment hereby repealed.

¹ In *Doick v. Phelps* (9 W. R. 70), it was held that this section does not preserve the exemption in

favour of western barges contained in sect. 101 of 7 & 8 *Geo. IV. c. 75*.

By sect. 3, the term "*lighterman*" shall mean any person working or navigating for hire a lighter, barge, boat, or like craft within the limits of this Act, and the term "*the company*" shall mean the master, wardens, and commonalty of watermen and lightermen of the river Thames. The Act is stated by sect. 10 to extend to all parts of the river Thames from and opposite to and including Teddington Lock in the counties of Middlesex and Surrey, to and opposite to and including Lower Hope Point near Gravesend, in the county of Kent, and all docks, canals, creeks, and harbours of or out of the said river as far as the tide flows therein.

By sect. 3, "*waterman*" is defined to mean any person navigating, rowing, or working for hire a "passenger boat," unless there is something in the context inconsistent with such meaning; and, by sect. 2, "*passenger boat*" is defined as "used throughout this Act" to be any sailing-boat, river steam-boat, row-boat, wherry, or other like craft used for carrying passengers within the limits of this Act, unless there is something in the context inconsistent with such meaning.

Sects. 9 to 28 regulate the constitution and election of the company.

Sects. 29 to 41 regulate the plying of watermen on Sundays.

By sect. 43, amended by sect. 13 of 33 & 34 *Vict. c. cxlix*, and by sect. 44, all owners of barges and lighters are to be registered.

By sects. 46 to 53, amended by sect. 53 of 27 & 28 *Vict. c. 113*, freemen of the company may employ apprentices on certain conditions.

By sect. 54, amended by sect. 59 of 27 & 28 *Vict. c. 113*, any person¹ not being a freeman licensed according to the

¹ This section, and sections 68 and 70, have been held not to apply to the case of a person conveying for his own purposes his servants and workpeople, and not

making any charge therefor; the whole sections being overridden by the words "for hire or gain;" *Todhunter v. Buckley*, 7 L. T., N. S. 273.

Act, or a duly qualified apprentice to a freeman, who shall navigate any wherry, passenger boat, lighter, vessel, or other craft¹ upon the river within the limits² of the Act for hire or gain is made liable to a fine of 40s.

Sects. 56 and 57 regulate the qualifications of watermen and lightermen's licences.

By sect. 66, amended by sects. 59 and 62 of 27 & 28 *Vict. c.* 113, no barge, lighter, or boat for goods or merchandise may be navigated within the limits of the Act, unless there be in charge of such craft a lighterman duly licensed, or an apprentice duly qualified, under penalty of 5*l.*³

By sect. 67, any unlicensed person who rows, steers, or navigates for hire, within the limits of the Act, any passenger boat, is liable to a penalty of 5*l.* for each offence.

By sects. 68—70, no passenger boat may carry more passengers than it is licensed to carry under penalty of 40s. for each extra passenger.

Sects. 71—79 regulate the prices which may be charged

¹ Sect. 57 of 7 & 8 Geo. IV. c. 75, empowered the making of bye-laws for regulating "the boats, vessels, and other craft to be rowed or worked within the limits of the Act:"—Held, this section applied to a steamboat of 187 tons, navigating at a speed forbidden by the bye-laws; *Tisdell v. Combe*, 7 A. & E. 788; see *Blandford v. Morrison*, 15 Q. B. 724.

Sect. 37 of 7 & 8 Geo. IV. c. 75 (Watermen's Act), imposes a penalty on any person who, not being a freeman of the Watermen's Company, or an apprentice to a freeman, or to the widow of a freeman, shall act as a waterman or lighterman, or ply, or work, or navigate, or cause to be worked or navigated, any wherry, lighter, or other craft upon the Thames from or to any place or ship within the limits of the Act for hire or gain:—Held, that a steam tug of 87 tons, employed in moving another vessel,

was not "a wherry, lighter, or other craft" under this section, and that a person navigating her, not being a freeman, did not incur a penalty; *Reed v. Ingham*, 3 E. & B. 889.

² Under a similar section of 7 & 8 Geo. IV. c. 75, it has been held that the navigation of a barge falls within the Act, although the voyage commence without the limits; and that an unauthorized person is liable to the penalty, although he is paid, not for the particular job, but by the week; *Reg. v. Dibble*, 4 E. & B. 888.

³ Six barges, fastened together in pairs, were towed by a steam tug on the river. Four lightermen were in charge, but no one was on board either of the last two barges:—Held, that the two barges were navigated in contravention of the Act; *Emlore v. Hunter*, 3 C. P. D. 116.

for passenger boats. By sect. 75, the company are to keep a register of licensed watermen and lightermen.

By sect. 80, bye-laws may be made for the purposes of the Act, provided they be not inconsistent with any of the laws of the kingdom, or with the bye-laws of the Conservators of the river Thames.¹ No bye-laws to be valid until approved by the Conservators of the Thames.

The remaining sections regulate proceedings for penalties, and provide exceptions in favour of the rights of the Trinity House, Mayor and Corporation of London, and owners of ferries, and others.

27 & 28 Vict. c. 113² (*The Thames Conservancy Act, 1864*)

¹ Under a similar section of 7 & 8 Geo. IV. c. 75, a bye-law was made imposing a penalty on any freeman who should set to work, to row or navigate, any non-freeman. A freeman who had employed a non-freeman to assist in navigating his barge was convicted under the bye-law:—Held, the bye-law was good, as it only applied to employment of persons for ordinary rowing, &c., and was not inconsistent with the Act; *Edmonds v. Watermen's Co.*, 1 Jur., N. S. 727.

² The following provisions are noteworthy:

Sect. 39 provides for the appointment of a trustee and of a deputy chairman; and sect. 40 regulates the remuneration of the conservators.

By sect. 40, the rights of the Trinity House under 6 & 7 Vict. c. lvii (for the regulation of lastage and ballastage in the river Thames), are to cease, and the supply of ballast is made free, any act, charter, or grant notwithstanding. The conservators are empowered to supply ballast (sect. 42), and to undertake ballast heaving (sect. 43) (to place or unload ballast on or from vessels), one-third of the net profits only of the ballastage being paid to her Majesty. The provisions of sect. 109 of the principal Act are repealed from and after the expiration of 6 & 7 Vict. c. lvii (sect. 45), and the Trinity House is

forbidden to license dredging after the same period (sect. 46), power being given to the conservators to dredge for ballast (sect. 47).

The powers of the Trinity House as to watermen (under 8 Eliz. c. 13) (sect. 49) are repealed, and considerable amendments are made in the Watermen's Company's Act (sects. 53—63), which by sect. 58 is to be read and construed with this Act as one Act.

By sect. 53, it shall be lawful for any male person above the age of twenty, who has not previously been bound an apprentice under the Watermen's Company's Act, to contract in writing with any person authorized to take apprentices under the Watermen's Company's Act, to serve such person in assisting to navigate a lighter, or in assisting to work or navigate a steamboat upon the river Thames.

By sect. 59, nothing in sect. 54 or sect. 66 of the Watermen's Company's Act is to apply to any craft passing entirely through the limits of that Act, or to any barges navigating the Grand Junction Canal, passing into or out of the said canal from or to the river Thames, and not navigated up or down the said rivers.

By sect. 60, sect. 87 of the Watermen's Company's Act shall be read and construed as if after the words "apprentice of," in the beginning

amends both 22 & 23 *Vict. c. xxviii*, and 20 & 21 *Vict. c. cxlviii*, therein called the Principal Act.

By sect. 1, the Principal Act and this Act may be cited as *The Thames Conservancy Acts, 1857 and 1864*, and by sect. 2, the provisions of the Principal Act, save so far as expressly repealed or varied by or inconsistent with the

of the section, were inserted the words "a freeman or of," so as to make the provisions therein contained applicable to the apprentice of a freeman; and by sect. 61, widows of freemen on taking apprentices are to employ freemen of the company or licensed watermen to instruct them.

Sect. 62. Notwithstanding anything contained in the Watermen's Company's Act, all barges duly registered from any places on the river Thames above Teddington Lock may be navigated on the river as far as London Bridge without being compelled to employ a freeman, apprentice, or other person licensed by the Watermen's Company in manner required by the Watermen's Company's Act or this Act; and by sect. 63, the rights of owners of barges or other craft passing along the river Lee and its branches into or from or along the Thames are preserved. By sect. 64, the conservators are empowered to make bye-laws for the regulation of bum-boats.

By sect. 68, sect. 65 of the principal Act is amended, the conservators being empowered to alter steamboat tolls, and to take tolls for moorings; while injuries to the river by throwing in ballast, or allowing offensive matter to flow into it, are prohibited by sect. 74.

Sect. 75 enacts a penalty on those assaulting constables and a water bailiff in the discharge of his duty; sections 76—78 deal with the procedure under the Act.

Savings.

Sect. 79. This Act, or any power conferred by this Act, or any bye-

law made or thing done under any such power, shall not—

- (1.) Take away, alter, interfere with, abridge, prejudice, or derogate from any right, title, claim, privilege, franchise, exemption, immunity, possession, profit, power, jurisdiction or authority saved or intended to be saved from or out of the operation of the principal Act by the following sections thereof,—viz. sections 51, 52, 80, 164, 166—168, and 170—179 (all inclusive), or any of them;
- (2.) Repeal, alter, or prejudicially affect the same sections, or any of them, or any enactment saved or intended to be saved from or out of the operation of the principal Act by the same sections, or any of them, or take away or alter any restriction imposed on the conservators by the same sections, or any of them;
- (3.) Take away, alter, interfere with, abridge, prejudice, or derogate from any right, title, claim, privilege, franchise, exemption, immunity, possession, profit, power, jurisdiction or authority saved or intended to be saved from or out of the operation of the principal Act by sections 165 and 169 thereof, or either of them, further or otherwise than is expressly provided by this Act.

Sect. 80 saves rights of Canary Island Commissioners under 32 Geo. III. c. xxxi; sect. 81, those of the Inner and Middle Temple under 25 & 26 *Vict. c. 93*; and sect. 82, those of the Metropolitan Board of Works under the Thames Embankment Acts, 1862 and 1863. See also sect. 36 of 33 & 34 *Vict. c. cxlix*.

provisions of this Act, shall be incorporated therewith, and be read as one Act.

Sects. 5 to 30 vary the provisions as to election of conservators.

By sect. 31, from and after 31st December, 1864, sect. 47 of the Principal Act shall be repealed (but not so as to affect any bye-laws made before the commencement of such repeal), and in lieu thereof fresh provisions are made for the publication of proposed bye-laws, which are not to have any force until allowed by the Queen in council.¹

By sects. 65—67, conservators may make bye-laws regulating the fishery.²

Various Acts have been passed for the regulation of the navigation on the Upper Thames above the flow of the tide, where there has been an immemorial right of navigation. These Acts regulate the rights and duties of owners of towing paths and locks; and provides compensation in many cases for interference with their rights, and afford protection to the public from their exactions.

Upper
Thames
Navigation
Acts.

Thus, by 21 *Jac. I. c. 33*, the Thames is to be made navigable between the village of Bercott and Oxford, and the commissioners empowered for the purpose are directed to agree with the adjoining landowners for compensation before interfering with their lands.

By 24 *Geo. II. c. 8*, which recites that the rivers of Thames and Isis have been navigable time out of mind from the city of London to the village of Bercott in Oxfordshire, and from the city of Oxford northwards beyond Lechlade in Gloucestershire, and that by the Act of 21 *Jac. I.*, the said rivers were made navigable from Bercott to Oxford, the Conservancy of the Thames from Staines to Cricklade is vested in Navigation Commissioners for the prevention of abuses and exactions.

¹ For bye-laws regulating navigation, see *post*, Appendix.

24th October, 1875; 20th January, 1860; and Orders in Council, 1869; and 30th of September, 1873.

² For bye-laws as to Fishing in the Thames, see Rules and Orders,

By sect. 2, they are empowered to settle rates to be taken from owners of boats, barges, &c., by owners of towing paths, locks, weirs, &c., and fix size and draught of barges, and make other regulation for the navigation and behaviour of bargemen, &c.

By sect. 3, no alterations are to be made in towing paths without leave of owners.

By sect. 5, the commissioners may hear complaints and levy fines, appeal being given to quarter sessions.

By sect. 8, they may view locks and inquire into their state.

They are empowered by sect. 9 to assess rates for carriage of goods.

By sect. 14, barge masters are made responsible for damages done by their men.

By sect. 16, owners of locks may be compelled to open them when water runs over high water mark, and to make compensation for injury caused by such overflow.

By sects. 17—20, powers are given to prevent and remove obstructions, and to order the cleansing of the rivers, rates being imposed on barges to defray expenses thereof.

By 11 *Geo. III. c. 45*, sect. 7, powers are given to the commissioners to purchase lands, &c. for making necessary works and towing paths, and to make further regulations as to traffic.

By sect. 9, they may oblige proprietors to keep up locks, weirs, &c., and to keep the water at a proper height; and they are bound by sect. 11 to keep a proper head of water for working mills.

By sect. 12, compensation is given to owners of locks for diversion of traffic caused by alterations.

By 29 & 30 *Vict. c. 89*,¹ the whole of the navigable part of the river Thames, from Cricklade to Yantlet Creek, is

The whole of the navigable part of the Thames now placed under one management.

¹ The Acts recited in the schedule to this Act are 24 *Geo. II. c. 8*; 11 *Geo. III. c. 45*; 15 *Geo. III.*

c. 11; 28 *Geo. III. c. 51*; 35 *Geo. III. c. 106*; 52 *Geo. III. c. 47*.

placed under one management, and the works, powers, &c. of the Upper Thames Commissioners are transferred, by sects. 24 and 25, to the Conservators of the river Thames under 20 & 21 *Vict. c. 113*, five additional conservators being appointed.

Sects. 3 to 24 regulate the election, &c. of the new conservators.

By sect. 28, various provisions of the Upper Navigation Acts are repealed.

By sect. 41, the conservators are to have the same powers in the Thames from Staines to Cricklade as they have below Staines, and the Conservancy Acts are to extend *mutatis mutandis* to the upper river.

By sect. 43, the property in all locks, dams and weirs, is vested in the conservators, who are to repair them instead of the mill owners, liberty being given to them, however, to disclaim any dam, &c.

By sect. 44, compensation is to be given for such weirs, &c.

By sect. 45, provision is made as to disused portions of the navigation.¹

By sect. 48, the conservators may regulate the opening and shutting of locks, and keeping back of water, provided they do not interfere with a sufficient head of water for mills; mill-owners, subject to future bye-laws, may draw down water for reasonable repair of mills.

By sect. 51, the five water companies may complain of works likely to injure the flow or purity of the water above their works.

By sects. 55—59, tolls are regulated.

By sects. 59—61, the water companies are to contribute to the expenses of the conservators.

By sects. 63—69, amended by sects. 3 and 4 of 30 & 31

¹ As to compensation for diverting traffic under statutes 11 Geo. III. c. 47; 15 Geo. III. c. 11; 28 Geo. III. c. 51; and 35 Geo. III.

c. 106, see *Rex v. Commissioners of Thames and Isis*, 5 Ad. & E. 804; 8 Ad. & E. 901.

Vict. c. ci, and by sect. 7 of 33 & 34 *Vict. c. cxlix*, the pollution of the river between Cricklade and the western boundary of the metropolis, and of any water-course within five miles communicating with the river, by sewage is prohibited; and by sect. 18 of the last-mentioned Act, the same provisions are to apply from the eastern boundary of the metropolis to Yantlet Creek, and to all streams within three miles. Nothing, however, is to interfere with or prejudice the rights of the Metropolitan Board of Works.¹

By sect. 11 of 30 & 31 *Vict. c. ci*, the commissioner of police for the metropolis may regulate the traffic within his jurisdiction on occasions of boat races, regattas, &c.; and by sect. 12, the conservators may make bye-laws to regulate the traffic on such occasions.²

By sect. 9 of 33 & 34 *Vict. c. cxlix*, bye-laws may be made for the regulation and registration of pleasure boats.

General enactments as to inland navigation. Prohibition of casting rubbish, &c. into navigable rivers, &c.

We will conclude this chapter by noticing a few general enactments relating to inland navigation.

Sect. 11 of 54 *Geo. III. c. 159*, prohibits the casting “of ballast, stone, slate, gravel, earth, rubbish, wreck or filth,” into ports, roads, roadsteads, havens, harbours, or navigable rivers, so as to tend to the injury or obstruction of the navigation thereof; all persons so offending to pay a penalty not exceeding 10*l.*, “over and besides all expenses which may be incurred in removing to a proper place the said matters which may have been deposited contrary to the provisions of this Act, such expenses to be recoverable in such manner, and with such power of commitment on non-payment thereof, as in cases of penalties or forfeitures under this Act.” Provided that

¹ As to the drainage of the metropolis, see 18 & 19 *Vict. c. 120*; 21 & 22 *Vict. c. 104*, and see also the Rivers Pollution Act (39 & 40 *Vict. c. 75*), *ante*, Chap. III. p. 174. As to the Thames Embankments, see 25 & 26 *Vict. c. 93*; 26 & 27 *Vict. cc. 45* and 75; 30 &

31 *Vict. c. 40*; 32 & 33 *Vict. c. 102*; 33 & 34 *Vict. c. 24*; and 36 & 37 *Vict. c. 40*.

² As to bye-laws regulating boat-races, see Order in Council, 17th March, 1875, and 11th November, 1869.

nothing contained in this section extends to the unloading of materials necessary for keeping havens in repair.

“*The Malicious Injuries to Property Act*” (24 & 25 Vict. c. 97), sect. 30, provides that—Persons unlawfully and maliciously breaking down or cutting down, or otherwise destroying any sea bank, or sea walls, or the bank, dam or wall of or belonging to any river, canal, drain, reservoir, pool or marsh, whereby any land or building shall be, or shall be in danger of being, overflowed or damaged, or shall unlawfully or maliciously throw, break, or cut down, level, undermine or otherwise destroy any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing path, drain, watercourse or other work belonging to any port, harbour, dock or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

24 & 25 Vict.
c. 97, ss. 30
and 31.

Injuries to
banks, walls,
&c. prohi-
bited.

And by sect. 31, it is enacted that—Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground and used for securing any sea bank, or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal with intent, and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for a term not exceeding seven years, and not less than three years; or to be imprisoned for any term

not exceeding two years with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

Railways
Clauses Act.

“*The Railways Clauses Act, 1863*” (26 & 27 *Vict. c. 92*),¹ contains in Part I. the following provisions for the protection of navigation:—

By sect. 13, where the company is authorized by the special Act to construct, alter, or extend any work on, in, over, through, or across tidal lands, or a tidal water, the company shall on or near the work, during the whole time of constructing, altering or extending thereof, exhibit and keep burning at their own expense every night, from sunset to sunrise, such lights, if any, as the Board of Trade from time to time requires or approves; and (notwithstanding the enactments for the time being in force respecting lighthouses) shall also, on or near the work when completed, always maintain, exhibit, and keep burning at their own expense every night, from sunset to sunrise, such lights (if any) for the guidance of ships as the Board of Trade from time to time requires or approves.

If the company fails to comply in any respect with the provisions of the present section, they shall, for each night in which they so fail, be liable to a penalty not exceeding twenty pounds.

Sect. 14.
The construction of
bridges.

By sect. 14, where the company is authorized or required by the special Act to construct a bridge over a navigable tidal water, and the special Act does not make express provision respecting the span or spans thereof, then the company shall construct the same with a span or spans of such headway and waterway, and with such opening span or spans (if any), and according to such plans as the Board of Trade directs or approves.

Sect. 15.
Barges, vessels, or
boats must
not be de-
tained at
bridges.

By sect. 15, where the company constructs a bridge with an opening span, it shall not be lawful for the company to detain any vessel, barge, or boat at the bridge

¹ “An Act for consolidating in
“one certain provisions frequently “inserted in Acts relating to rail-
“ways.”

for a longer time than may be necessary for admitting a carriage or engine traversing the railway and approaching the bridge to cross the bridge, and for opening the bridge to admit the vessel, boat, or barge to pass; and the company shall be subject to, and shall abide by, such regulations with regard to the user of the bridge, as may from time to time be made by the Board of Trade.

If the company detains a vessel, barge, or boat longer than the time aforesaid, or fails in any respect to abide by any such regulation as aforesaid, they shall for every such offence be liable to a penalty not exceeding twenty pounds, without prejudice to any remedy against them for any loss or damage sustained by any person.¹

By sect. 16, where the railway cuts off access between the land and a tidal water or tidal lands, then, and in every such case, the company shall, during the construction of the railway, and from time to time thereafter, make and shall permanently maintain and allow to be used by all persons and at all times, free of toll or other charge, all such footways and carriage ways over, under or across the railway, or on a level therewith, as the Board of Trade from time to time directs or approves: provided always as follows:—

Sect. 16.
Access to
tidal lands
and tidal
waters.

(1) The company shall not be obliged to make a footway or carriage way over lands for the use of an owner or occupier who has agreed to receive, and has been paid compensation for the severance thereof from the tidal waters or tidal lands.

(2) The company shall not be obliged to make, or to allow to be made, a footway or carriage way in such manner as would interfere with the working or using of the railway.

(3) The expense of the making and maintenance of a

¹ See as to liabilities of companies with regard to construction of bridges, *A.-G. v. Furness Railway*, 38 L. T., N. S. 555; see *post*, Chap. VIII.

footway or carriage way required to be made after the construction of the railway, shall be defrayed by the persons or body interested in the tidal water or tidal lands, for whose benefit or convenience the same is required.

Where the footway or carriage way is made across the railway on the level, then the manner of making and watching the level crossing shall be subject to the approval of the Board of Trade; and where the level crossing is made after the construction of the railway, then all expenses attending the watching thereof shall be defrayed by the persons or body interested in the tidal water or tidal lands, for whose benefit or convenience the same is required.

Sect. 17.

Railways
skirting navi-
gable tidal
rivers, &c.

By sect. 17, where the company is authorized by the special Act to construct a railway skirting a public navigable tidal river or channel, the company shall not make any deviation of the railway from the continuous centre line thereof, marked on the plan deposited by them at the Board of Trade, even within the limits of deviation shown on that plan, in such manner as to diminish the navigable space, without the previous consent of the Board of Trade or otherwise than in such manner as is expressly authorized by the Board of Trade.

If any deviation is made in contravention of the present section, the Board of Trade may abate and remove the work in the construction whereof the deviation is made or any part thereof, and restore the site thereof to its former condition at the expense of the company; and the amount of such expense shall be a debt due from the company to the Crown, and be recoverable accordingly with costs, or the same may be recovered with costs, as a penalty is recoverable from the company.

Sect. 18.

Abandon-
ment of
works on, in,
across, &c.
tidal lands or
tidal waters.

By sect. 18, if a work constructed by the company on, in, over, through, or across tidal lands or a tidal water, is abandoned or suffered to fall into decay, the Board of

Trade may abate and remove the work, or any part of it, and restore the site thereof to its former condition, at the expense of the company; and the amount of such expense shall be a debt due from the company to the Crown, and be recoverable accordingly with costs, or the same may be recovered with costs, as a penalty is recoverable from the company.

By sect. 19, if at any time the Board of Trade deems it expedient for the purposes of the special Act, or of this part of this Act, to order a survey and examination of a work constructed by the company on, in, over, through, or across tidal lands or tidal waters, or of the intended site of any such work, the company shall defray the expense of the survey and examination, and the amount thereof shall be a debt due from the company to the Crown, and be recoverable accordingly with costs, or the same may be recovered with costs, as a penalty is recoverable from the company.

Sect. 19.

Surveys of works over tidal waters or tidal lands may be ordered by the Board of Trade.

"*Tidal river*" is defined by sect. 3 to mean any part of a river within the flow and ebb of the tide at ordinary spring tides; "*tidal water*" to mean any part of the sea or any part of a river within the flow and ebb of the tide at ordinary spring tides; and "*tidal lands*" to mean such parts of the bed, shore or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at ordinary spring tides.

Sect. 3.

Definitions.

By 5 *Geo. IV. c. 83, s. 4*, a suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf or warehouse, near or adjoining thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond, and may be convicted.¹

Police regulations.

¹ This has been held not to apply to all streets and highways, but only to streets and highways leading or adjacent to places of

the character mentioned in the Act; *Ex parte Tinam*, 39 L. J., M. C. 129.

By 3 & 4 *Vict. c. 50*,¹ provision is made for keeping the peace on canals and navigable rivers. The preamble of the Act takes note of the outrages committed on canals and navigable rivers through England and Wales; and sect. 1 provides for the appointment of constables on the application of the committee of the Board of Trade, who are to be paid out of the monies of the proprietors (sect. 3).

By sect. 13, it is provided, that nothing in local Acts containing penalties shall be thereby repealed.

Tolls.

8 & 9 *Vict. c. 28*, authorizes canal companies, and the commissioners of navigable rivers, to vary their tolls or rates on different portions of their canals, and to reduce or advance them (sect. 1), charging the tolls equally on all persons under the like circumstances (sect. 2). The Act is not to apply, however, to existing companies until a meeting of the shareholders have determined thereupon, nor in other cases till approved by trustees or proprietors, and notices thereof published.²

Regulation
of traffic on
navigable
rivers and
canals.

Ample provision, however, has now been made with regard to the regulation of traffic on navigable rivers and canals.

By 8 & 9 *Vict. c. 42*,³ canal companies are empowered

¹ "An Act to provide for keeping peace on canals and navigable rivers" (1840).

² "An Act to empower canal companies and commissioners of navigable rivers to vary their tolls, rates and charges on different parts of their navigation" (1845). Sect. 4 saves rights of existing commissioners specifically reserved by their Acts; and by sect. 5, canal companies are subject to a limitation of profits not to raise their dues so as to exceed the maxim of profits.

³ "An Act to enable canal companies to become carriers of goods upon their canals." The preamble notices the powers of carrying given to railway com-

panies by divers Acts; and whereas greater competition for the public advantage would be obtained if similar powers were granted to canal and navigation companies which have from time to time been incorporated or established under authority of Parliament; but such beneficial purpose cannot be effected without the authority of Parliament, &c. The Act, however, is not to apply to canals vested in shareholders until approved of at a meeting, or, in other cases, by the proprietors, and notice of the determination to adopt the Act shall have been fully advertised (sect. 12). The Act was amended by 21 & 22 *Vict. c. 75*, entitled "An Act to amend

to carry goods on their canals, or canals communicating therewith (sect. 1); but a company is to be subject to the bye laws of any other company upon whose canal they may act as carriers (sect. 2). Boats and power for hauling and towing vessels of other persons may be provided by companies, who may sue and be sued as carriers, and prefer indictments, and are to be subject to the provisions in force relating to common carriers (sect. 6). Tolls are to be charged equally on all persons, and may be leased by a company (sect. 8); the lessees being deemed collectors of tolls during the lease (sect. 9); which is to be void on their making default (sect. 10); and may in such case be relet. By sect. 7, companies may contract with other companies to facilitate the conveyance of goods.

This statute was amended by 10 & 11 *Vict. c. 94*,¹ which is incorporated with it (sect. 1); and by sect. 2, canal companies were empowered to borrow money in the manner prescribed by 8 & 9 *Vict. cc. 16, 17*,² and to apply the same to the purposes of the recited Act. The 8 & 9 *Vict. cc. 16, 17*, are incorporated by sect. 3, and the rights of existing companies are saved by sect. 2.

Another important enactment in this respect is *The Railway and Canal Traffic Act, 1854* (17 & 18 *Vict. c. 31*),³ which requires companies to make arrangements and

“the law relating to cheap trains, “and to restrain the exercise of “certain powers of canal companies being also railway companies.” Sects. 1 & 2 amends the law as to charges; and sect. 3 prohibits canal companies who are also railway companies from taking a lease of canals unless specifically authorized, notwithstanding anything to the contrary in the recited Act.

¹ “An Act to amend an Act to “enable canal companies to become carriers of goods.” 1847.

² The Companies Clauses Consolidation Acts, 1845.

³ “An Act for the better regulation

of the traffic on railways and canals” (1854). By sect. 1, “traffic” includes “not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, and vehicles of every description adapted for running or passing on the railway or canal of any such company;” and “canal” includes “any navigation whereon tolls are levied by authority of Parliament, and also the wharves and landing-places of and belonging to such canal or naviga-

afford all reasonable facilities for receiving and forwarding traffic, without unreasonable delay, and without partiality (sect. 2); and enables parties injured in this respect to apply by motion or summons to a superior Court (sect. 3). By sect. 7, companies are to be liable for neglect or default in the carriage of goods, notwithstanding notice to the contrary, though not beyond a limited amount in certain cases, unless the value be declared at the time of delivery, and extra payment made.

The Railway and Canal Traffic Act, 1854, was amended in 1873 by *The Regulations of Railways Act, 1873*;¹ by sect. 4 of which the Railway Commissioners are appointed for the purpose of "carrying out the provisions of *The Railway Traffic Act, 1854*, and of this Act." To them² is transferred, by sect. 6, the jurisdiction established under 17 & 18 *Vict. c. 31*, s. 3, together with certain powers and duties of the Board of Trade under 26 & 27 *Vict. c. 92* (sect. 10). Sect. 2 of 17 & 18 *Vict. c. 31*, is explained by sect. 11, and to it are added several important provisions as to affording facilities for the transfer of traffic. Sect. 16 regulates the arrangements between railway companies and canal companies; and sect. 17 provides for the maintenance and due repair of canals or parts of canals by railway companies owning them, or having them under their management.

The above enactment, together with *The Board of Trade*

"tion and used for the purposes of "public traffic." The expression "railway company," "canal company," or "railway and canal company," includes "any person being owner or lessee of or any contractor working any railway or canal or navigation constructed or carried on under the powers of any Act of Parliament." It has been held that the Railways Clauses Consolidation Act, recited by 8 & 9 *Vict. c. 28*, are *in pari materia* with this Act. See *Strick v. Swansea Canal*, 16 C. B., N. S. 245; see *post*, Chap. IX.

¹ 36 & 37 *Vict. c. 48* (1873), "An Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith."

² They are to be three in number, "one of whom to be experienced in the law, and one of experience in railway business," and to have two assistant commissioners (sect. 4). By sect. 5, no commissioner is to be interested in railway or canal stock. For regulations as to their powers, &c., see ss. 21—37.

Arbitrations Act, 1874,¹ constitute *The Regulations of Railways Acts*, 1873 and 1874. By sect. 6 of the latter Act, the Board of Trade is empowered to appoint the Railway Commissioners arbitrators or umpires, where any difference arises to which a railway company or canal company is a party, and is required or authorized, under the provisions of any general or special Act, passed either before or after this Act, to be referred to the arbitration or determination of the Board of Trade. By sect. 7, the Commissioners are to have the same powers of decision, of rescinding, or varying, or adding to any award or decision previously made by any arbitrator as the original arbitrator.

The provisions of *The Explosives Act*, 1875 (38 & 39 *Vict. c. 17*),² concern navigable rivers and canals. Sect. 35 (part 1), empowers railway and canal companies, with the sanction of the Board of Trade, to make bye-laws³ for the conveyance, loading, and unloading of gunpowder; and by sect. 39 (part 2), the regulations as to gunpowder are applied to other explosives.⁴

Carriage of explosives.

By sect. 108, "*carrier*" is defined as including all persons carrying goods or passengers for hire, by land or water; and "*canal company*" to mean "any person or body of persons corporate or unincorporate, being owner or lessee, or owners or lessees, of, or working, or entitled to charge tolls for the use of any canal in the United Kingdom, constituted or carried on under powers of any

¹ 37 & 38 *Vict. c. 40* (1874), "An Act to amend the powers of the Board of Trade with respect to inquiries, arbitrations, appointments, and other matters under special Acts, and to amend the regulation of Railways Act, 1873, so far as regards the reference of disputes to the railway commissioners in lieu of arbitrators." Sect. 8 enacts, the Act be read as one with 36 & 37 *Vict. c. 48*, and the two be cited together as the Railways Regulation Acts, 1873

and 1874.

² "An Act to amend the law with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitroglycerine and other explosives."

³ See also Rules and Bye-laws on this subject for the River Thames of 1875 and 1878.

⁴ Part III. deals with the administration of the law; the Secretary of State being empowered by sect. 53, and the Board of Trade by sect. 58, to appoint inspectors.

“ Act of Parliament, or intrusted with the duty of con-
 “ serving, maintaining, or improving the navigation of
 “ any inland water ; and every such canal and inland
 “ water under the control of a canal company, as above
 “ defined, and any wharf, dock, pier, jetty, and work, in
 “ or at which barges do or can ship or unship goods or
 “ passengers, and other area, whether land or water,
 “ which belong to or are under the control of such canal
 “ company, are in the other portions of this Act included
 “ in the expression ‘ canal.’ ”¹

We will conclude this enumeration of the statutes touch-
 ing navigation, by drawing attention to the most recent
 on the subject—*The Canal Boats Act, 1877* (40 & 41 Vict.
 c. 60), which came into force on the 1st January, 1878.²

Canal Boats
 Act, 1877.

By sect. 1, canal boats used as dwellings are to be
 registered as required by the Act ; and failure to comply
 with its provisions renders the master and owner³ each
 liable to a fine not exceeding 1*l.* for each occasion on
 which the boat is used as a dwelling.

The registration authority for the purpose is to be (s. 7)
 such or more of the sanitary authorities having districts
 abutting on a canal, as may from time to time be pre-
 scribed by the regulation of the Local Government Board ;
 and a canal boat shall be registered with some registration
 authority having a district abutting on the canal on which
 such boat is accustomed or intended to ply. Sect. 2
 empowers the Local Government Board to make regula-
 tions for registration, fixing the number, age, and sex of
 persons allowed to dwell on a canal boat ; and for promo-

¹ “ *Inland Waters*,” means “ any
 “ canal, river, navigation, or water
 “ which is not tidal water ; ”
 “ ship ” includes “ any description
 “ of vessel used in sea navigation,
 “ whether propelled by oars or
 “ otherwise ; ” and “ *boat* ” means
 “ any vessel not a ship as above
 “ defined, which used in navigation
 “ in any inland water or harbour,
 “ whether propelled by oars or

“ otherwise.” (Sect. 108).

² “ An Act to provide for the
 “ registration and regulation of
 “ canal boats used as dwellings.”

³ Sect. 14 defines “ *owner* ” as
 “ a person who, though only the
 “ hirer of a canal boat, appoints
 “ the master and other persons
 “ working it ; ” and “ *master* ” as
 “ the person being for the time in
 “ command or charge of the boat.”

ting cleanliness, and preventing infectious disease. By sect. 6, provision is made for enforcing the provisions of *The Education Acts of 1870, 1873, and 1876*,¹ with respect to children dwelling on board canal boats.

“Canal” is defined by sect. 14 to mean “any river, inland navigation, lake, or water being within the body of a county, whether it is or not within the ebb and flow of the tide;” and the expression “*canal boat*” is stated by the same section to mean “any vessel, however propelled, which is used for the conveyance of goods along a canal as above defined, and which is not a ship duly registered under *The Merchant Shipping Act, 1854*, and the Acts amending the same.”

¹ 33 & 34 Vict. c. 75, 36 & 37 Vict. c. 86, 39 & 40 Vict. c. 79; “parent” is defined by sect. 14 as the “guardian and every person liable to maintain, or who has the actual custody of, a child.”

CHAPTER VIII.

OF FERRIES AND BRIDGES.

Incidents to
rights of
water.

THE exercise of the various rights relating to water, which have been noticed in this volume, is connected with certain incidents accompanying their possession. Of these the principal are—1. The right to the franchise of a *ferry*; 2. *Bridges*, and the duties connected with their erection and repair; 3. *Tolls*, and the liability thereto; and 4. *The rateability* of certain species of the rights above noticed, such as canals, waterworks, docks, &c. It is proposed to consider in the present chapter the laws relating to ferries and bridges, both of which arise from the interruption of a highway on land by a watercourse; and to discuss in the following one those regulating the right to take tolls, and the liability of various rights of water to be rated to the poor.

Ferry.

Definition.

A ferry is the right to keep a boat for the purpose of carrying persons or their goods across a river, and to take toll for such carriage.¹

How created.

It may be created either by royal grant or licence, or by prescription;² but the latter case presupposes an Act of Parliament granting such franchise, without which no ferry can be lawfully set up save by a licence from the Crown.³

“A man may, under such titles,” says the editor of

¹ 1 Stephen's Blackstone, 6th ed. pp. 682, 683; Wharton's Law Lexicon, 4th ed. p. 391.

² Stephen's Blackstone, vol. i. p. 682; 2 Inst. 220: *Trotter v. Harris*, 2 Y. & J. 285; Wharton's Law Lexicon, p. 391; Woolrych,

Law of Waters, p. 36.

³ 1 Stephen's Blackstone, sup.; 2 Inst. 220; *R. v. Marsden*, 3 Burr. 1812; Willes, 512 n.; Com. Dig. Piscary, 3; *Hale de Jure Maris*, pt. 1, c. 2; *Huzzey v. Field*, 2 C. M. & R. 432 *et seq.*

Stephen's Commentaries,¹ "lawfully claim to be the proprietor of a ferry,² though he be not the owner, either of the water over which it is exercised,³ or of the soil on either side of the river;⁴ but he must possess over the soil such rights at least as will authorize him to embark and disembark his passengers thereon.⁵ . . . The right to take toll also from customers is usually a part of the privilege. . . . But the right of the Crown to authorize the collection of tolls is viewed by the law with a salutary jealousy; so that no burthen of that kind can be imposed on the public, unless it have (in the language of the books) a reasonable commencement,⁶ that is, unless it be founded on an adequate consideration, as between the public and the grantee; which consideration is (in the case of a ferry) to keep up a boat for the passage over a stream not otherwise fordable.⁷ And it is also essential that the burthen be reasonable in its amount,⁸ for where the tolls granted are outrageous, the franchise is illegal and void."⁹

The right to tolls usually a part of the privilege,

but it must be founded on an adequate consideration.

Where the franchise to a ferry exists, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll when due, but also against such as disturb his franchise by setting up a new ferry, so as to diminish his custom,¹⁰ though he is himself liable to a criminal indictment, if, either wilfully or by his neglect of duty, he obstructs the subjects of the realm in the lawful use of such ferry.¹¹

Rights of action of parties entitled to franchise of a ferry.

¹ Vol. i. p. 682.

² *Newton v. Cubitt*, 12 C. B., N. S. 32; and as to ancient ferries, see *Letton v. Gooden*, Law Rep., 2 Eq. Cas. 123.

³ Com. Dig. in tit. Pisc. 13.

⁴ *Peter v. Kendal*, 6 B. & C. 703.

⁵ *Ibid.*

⁶ Stephen's Blackstone, vol. i. p. 683; *Mayor of Nottingham v. Lambert*, Willes, 116.

⁷ *Ib.*; *Heddy v. Wheelhouse*, Cro. Eliz. 558, 592.

⁸ *Ib.*; 2 Inst. 219.

⁹ *Ib.*; Stat. 1 Westminster, c. 31;

2 Inst. 219; Cro. Eliz., ubi sup.; 2 Bl. Com. 37; Willes, ubi sup.

¹⁰ Stephen's Blackstone, vol. i. p. 683; 2 Roll. Abr. 140; Com. Dig. Action on the Case for a Nuisance (A.); *Blisset v. Hart*, Willes, 503; *De Rutzen v. Lloyd*, 5 Ad. & E. 456; *Bridgland v. Shapter*, 5 M. & W. 375; *Pim v. Curell*, 6 M. & W. 234.

¹¹ Stephen's Blackstone, vol. i. p. 684; Willes, 512, n.; *Payne v. Partridge*, 1 Show. 231; see also

Thus Blackstone says,¹ "If a ferry is erected on a river, "so near another antient ferry as to draw away its custom, "it is a nuisance to the owner of the old one. For where "there is a ferry by prescription, the owner is bound to "keep it always in repair and readiness for the ease of all "the king's subjects; otherwise he may grievously be "amerced;² it would be, therefore, extremely hard if a "new ferry were suffered to share his profits, which "does not also share his burthen."

To compensation under
8 & 9 Vict.
c. 20.

So a landowner, not the owner of the water or landing-places, has been held³ entitled to compensation under 8 & 9 *Vict. c. 20*, from a railway company for injuriously affecting his land by obstructing the access to a ferry over the river and appurtenant to the land in question, the ferry being an ancient ferry which had always been attached to a house and premises, the occupier of which had always kept a ferry boat. In this case it was held that a grant of the house and land with its "profits and commodities" might pass the ferry, as there was evidence that they had never been separated—had they ever been separated, plaintiff could not have recovered in respect of injury to his land.⁴

What will
pass a ferry.

Actions for
disturbance
of a ferry.

In an action⁵ for disturbance of a ferry, the 1st count of declaration stated that plaintiffs were possessed of a ferry across the Tyne between North and South Shields for conveyance of passengers, &c., and that defendant disturbed it by carrying passengers for hire; 2nd count stated a right to ancient ferry. Defendants pleaded, *inter alia*, not guilty, not possessed, and that the boat was under four tons burthen. The company was incorporated by Act 10 *Geo. IV. c. 98*; sect. 85 of which enacts, that, after

Shep. Com., vol. iii. p. 529, n.;
Bl. Com. vol. iii. p. 219; Bracton,
l. iv., c. 46; 2 Inst. 567.

¹ Com. vol. iii. 16th ed. p. 218.

² *Ib.*; 2 Roll. Abr. 140.

³ *Reg. v. Great Northern Railway Co.*, 14 Q. B. 25. See, too, *Reg. v. Cambrian Railway*, 6 L. R., Q. B.

442, where a ferry was held to be "lands," within sect. 3 of "The Lands Clauses Act, 1845" (8 & 9 Vict. c. 18).

⁴ *Ib.*

⁵ *North and South Shields Ferry Co. v. Barber*, 2 Ex. 136.

the ferry shall be established, no other ferry shall be set up within the said limits; and if any other person shall use any boat or other vessel of the burthen of four tons or upwards, in ferrying for hire across the river, he shall forfeit 5*l*. At the time of passing the statute there was an ancient ferry, which the company under the powers of their Act purchased. It was held:—

1st. That the word “burthen” means not registered admeasurement, but capacity of carrying;

2nd. That the 85th section did not limit the general right of ferry, but only added a cumulative penalty for persons using boats above four tons burthen;

3rd. That there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, and not from one particular terminus to another;

4thly. That the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not a prescriptive ferry to the exclusion of all private boats, but simply of a ferry;

5thly. That on purchase of the ancient ferry, and completion of the new one, the former became extinct by operation of the Act of Parliament.

The owner of a ferry¹ obtained an Act of Parliament enabling him to build a bridge instead of the ferry, and to take tolls—and enacting that anyone evading payment of tolls by conveying persons across the river within the limits of the ferry otherwise than by the bridge should forfeit and pay 40*s*. On motion to restrain a railway company, whose terminus was within the limits of the ferry, from conveying passengers across river in steamboats; it was held, that though the Act gave the owner no right of action against persons evading tolls, yet if he were entitled to recover penalties *de die in diem* the Court could protect him by injunction from the infringement of his right.²

¹ *Cory v. Yarmouth and Norwich Railway Co.*, 3 Hare, 593.

² See remarks of Wigram, V.-C., as to the balance of convenience

and inconvenience relating to the granting of an injunction. See also *A.-G. v. Birmingham*, 4 K. & J. 528, *ante*, p. 162.

Description
and limits of
a ferry.

In *Pim v. Cruel*,¹ a declaration for infringement of a ferry described the ferry as being across the Mersey, from the township, parish, chapelry, or place of Birkenhead in county Chester to the parish, township, or place of Liverpool in county Lancaster:—Held, 1. That plaintiff might recover on this declaration, although he proved a ferry both ways, for that under the lease of a ferry describing it as a ferry across a river both ways a ferry across a river one way will pass; 2nd. That the description did not import a ferry from the whole township, &c. of Birkenhead to the whole parish of Lancaster, but that plaintiff might recover on proof of a ferry from any point within Birkenhead to Lancaster.

If there be an exclusive ferry from A. to B., it does not prevent persons from going by any other boat from A. directly to C., though it lie near B., if it be not done fraudulently, and is a pretence for avoiding the regular ferry.²

Where³ an action by the farmer of a common ferry was brought against another, a waterman, who had lands on both sides of the river three-quarters of a mile from plaintiff's ferry, for ferrying over passengers' horses, &c., it was held that the plaintiff's claim was uncertain and without limits of distance, for by the same reason that defendant may not use a ferry three-quarters of a mile from plaintiff's ferry, by the same he may not use one, two, three, ten or twenty mile off.⁴

In an action for disturbance of ferry a count alleging that plaintiffs were entitled to a certain ferry across the Thames, and that defendant conveyed passengers and goods across the river *near* the plaintiffs' ferry, was held, after verdict for the plaintiffs, to disclose a sufficient ground of action.⁵

It is sufficient for a plaintiff to prove that he was in

¹ 6 M. & W. 234.

² *Tripp v. Frank*, 4 T. R. 666.

³ *Churchman v. Tunstall*, Hard.
162.

⁴ A decree was, however, granted

subsequently in the case by Lord Hale; see *Huzzey v. Field*, 2 C. M. & R. 432.

⁵ *Blacketer v. Gillett*, 9 C. B. 26 (Potter's Ferry).

possession of the ferry at the time the cause of action accrued, to entitle him to maintain an action for disturbance of it.¹ From an user of thirty-five years, the jury may presume that a ferry had legal origin.¹ A variation in the amount of ferryage will not avoid the franchise.¹

The owner of a ferry demised it by parol to A. at a certain annual rent. A., at the end of a few weeks, proposed to become the servant of the owner as boatman, and to account to him for all money received. This was assented to, and A. became such servant. It was held, this was a surrender of A.'s interest in law; and also, that neglect of duty on part of owner of a ferry is no answer to the action for disturbance, though the Crown may, on that ground, repeal the grant by *quo warranto* or *scire facias*.²

In *Letton v. Gooden*,³ upon a bill, by the lessee of the Watermen's Company of the right of plying on Sundays from certain stairs to a certain point across the river, claiming a right of ferry, and seeking to restrain a new ferry which had been established fifteen yards from his ferry; it was proved that the company were licensed by Act of Parliament to appoint watermen to ply on Sundays from such common stairs on the Thames as might be appointed; and that any other person, except so appointed, plying on Sundays from such places, was liable to a penalty of 40s. for each offence. It was also shown that the defendants had an ancient ferry from the Isle of Dogs to Greenwich, but not back again.⁴ The Court were of opinion that, if plaintiff had the right he claimed, he might come to the Court for an injunction, and would not be left constantly to insist on the penalties under the Act; and further, that the new ferry was so near the plaintiff's, that the Court would have restrained it: but it was held that since the plaintiff's right only related to Sundays, and as he was licensed to ply by Act of Parliament, and

*Letton v.
Gooden.*

¹ *Trotter v. Harris*, 2 Y. & J. 285.

³ L. R., 1 Eq. 123.

⁴ See as to this, too, *Giles v.*

² *Peter v. Kendal*, 6 B. & C. 703. *Groves*, 12 Q. B. 721.

was under no obligation to keep up the ferry, his right did not stand upon the same footing as an ancient ferry. Kindersley, V.-C., remarked: "Such a right of ferry is "an exclusive right or monopoly, and as such, it is in itself "an evil, being in derogation of the common right, for by "common right any person may carry persons across the "river. But as a compensation for this, there is the great "advantage to the public, that they have at all times at "law, by reason of the ferry, the means of travelling on "the king's highway, of which the ferry forms a part, for "the owner of the ferry is always under the obligation to "provide proper boats with a competent boatman."

*Mathews v.
Peach.*

Sect. 38 of Watermen's Act, 7 & 8 *Geo. IV. c. 75*, imposes a penalty on owners of boats working boats within the limits of the Act without a licence.

Sect. 99 exempts owners of ferries. It has been held, that the owner of an ancient ferry might exercise the right without a licence; but that where a ferry appeared to have been always exercised from a given landing place in Middlesex to given landing places in Kent, the privilege did not protect the owner of such ferry in working a boat from another landing place in Middlesex distant 800 yards from the ancient one.¹

*Huzzey v.
Field.*

Where there is an ancient ferry from A. to B. which leads to a public highway, and another makes a landing place a short way from B., and carries passengers over from A. to C., from whence they pass to the same highway, upon which the ancient ferry is established, before it reaches any town or village—it is an injury to the ancient ferry.²

But by the existence of an ancient ferry from one particular point to another, persons are not precluded from using the river as a public highway from or to all the towns or places on its banks, which are not in a line leading from one terminus of the ferry to another.²

¹ *Mathews v. Peach*, 5 Ell. & Bl. 546.

² *Huzzey v. Field*, 2 C. M. & R. 432.

“It is quite clear,” said Lord Abinger, C. B.,¹ “that a ferry is a franchise which none can set up without licence from the Crown, and in the case of a ferry by prescription, a grant or licence is presumed. As early as Year Book 22 *Hen. VI.* 146, it is thus laid down: ‘If I have, of ancient time, a ferry in a town, and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case;’ and Newton says: ‘The case of a ferry is different from the case of a mill, for you are bound to sustain the ferry to serve and repair it, in ease of the common people.’ So far the authorities appear to be clear, that if a new ferry be set up without the king’s licence to the prejudice of the old one, an action will lie, and there is no case which has the appearance of being to the contrary except *Tripp v. Frank*, hereafter mentioned. These old authorities proceed upon the ground—first, that the grant of the franchise is good in law, being of a sufficient consideration to the subject, who as he receives a benefit, may have by grant of the Crown a corresponding obligation imposed on him in return for the benefit received. A public ferry, then, is a public highway of a special description, and its termini must be places where the public have rights, as towns, or villis, or highways leading to towns or villis. The right of the grantee is in the one case an exclusive right of carrying from town to town, in the other from one point to the other.”

In *Newton v. Cubitt*,² Willes, J., observed: “A ferry *Newton v. Cubitt.* exists in respect of persons using a right of way where the line of way is across water. There must be a line of way on land coming to a landing-place on the water’s edge, or, where the ferry is from or to a vill, from or to one or more landing-places in the vill. The franchise is established to secure convenient passage; and the ex-

¹ *Hussey v. Field*, 2 C. M. & R. 432.

² 12 C. B., N. S. 32.

“ exclusive right is given because in unpopulous places there
 “ might not be sufficient profit to maintain the boat if
 “ there was no monopoly. The ferry is unconnected with
 “ the occupation of land, and exists only in respect of the
 “ persons using the right of way. The questions whence
 “ they come and whither they go are irrelevant to the
 “ exercise of that right, and the ferryman has no inchoate
 “ right in respect of any of them unless they come to his
 “ passage. Such being the nature of a ferry, the notion
 “ that a large area of land should be subject to the servi-
 “ tude, that the owners and occupiers thereof should be
 “ prohibited from using the highway of the Thames as
 “ they may choose, and should be under an obligation to
 “ get to the highway leading from Potter’s Stairs across
 “ to Greenwich only therefrom, is anomalous.”

That was an action for infringement of plaintiffs’ ancient ferry by carrying in the line of and near to it. The evidence showed a right of ferry in plaintiffs from a point in the Isle of Dogs, called Potter’s Ferry, to Greenwich, and that down to 1812 there was only one public road across the island—*i. e.* from Poplar to Potter’s Ferry—but that since then many houses, &c. had been built in the island. Defendants erected a pier 1280 yards from Potter’s Ferry Stairs, and by means of a steamboat carried passengers therefrom to Greenwich without any intention of diverting passengers from plaintiffs’ ferry. There was no public road from this new district to Potter’s Ferry:—Held, that the evidence only established a right of ferry from Potter’s Ferry to Greenwich, and not from the whole Isle of Dogs, and did not show an actionable disturbance of plaintiffs’ ferry, though defendants might have occasionally carried a person who came from Poplar.

The rights and privileges of owners of ferries are very clearly stated by Mellish, L.J., in *Hopkins v. Great Northern Railway*.¹

There a railway company under an Act of Parliament

¹ 2 Q. B. Div. 230 *et seq.*

constructed across a river, half a mile above an ancient ferry, a railway bridge and foot bridge, the foot bridge being used by persons going to the railway station and also to other places. The traffic across the ferry consequently fell off, and the ferry was given up, and on the claim for compensation by the owners under the Lands and Railways Clauses Compensation Acts (8 *Vict. c. 18*, and 8 *Vict. c. 20*), it was held¹ (reversing the decision of the Queen's Bench Division), that no compensation could be recovered,—since, 1st, An action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or the foot bridge, if they had been erected without the authority of an Act; 2nd, On the ground that, the injury to the ferry being occasioned, not by the construction, but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railways Clauses Act.

Mellish, L. J., who delivered the judgment of the Court,² reviewing the facts of the case, said: "We will consider first that which is by far the most important,—whether an action could have been maintained in respect of the diversion of traffic caused by the railway bridge. Now, in order that such an action may be maintained, it is clearly not sufficient for the owner of the ferry to prove that something has been done by which traffic has been diverted from his ferry. He must prove that his right has been violated. He is the owner of a particular description of monopoly,³ which the law allows to be created from its being presumed to be for the public advantage; and to maintain an action he must prove that the defendants have in substance done that which he has the sole right to do. Now we apprehend that the owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream

Owner of a ferry is the owner of a particular description of monopoly for the public advantage. But has not a grant of carrying by any means whatever.

¹ *Ib.* p. 225.

² Lord Coleridge, C. J., Mellish, L. J., Brett and Amphlett, JJ. A.

³ Cf. Kindersley, V.-C., in *Letton v. Gooden*, L. R., 1 Eq. 123, for which see *ante*, p. 491.

Conditions of
grants from
the Crown.

Extent of
protection
afforded by
the Crown to
its grantee.

No action for
violations of
right other-
wise than by
means of
boats.

“ by any means whatever, but only a grant of an exclu-
 “ sive right to carry them across by means of a ferry.
 “ In *Payne v. Partridge*,¹ it was laid down that the owner
 “ of a ferry could not himself build a bridge in substitu-
 “ tion for the ferry,—which seems a clear decision that he
 “ has not a grant of every mode of carrying goods and
 “ passengers across; for if he had, he would surely be
 “ entitled, if not bound, to provide the best means of
 “ crossing. The first grantee of the ferry is supposed to
 “ have represented to the Crown that it would be for the
 “ public advantage that a ferry should be established in
 “ the particular locality, and then, in consideration of the
 “ grantee undertaking perpetually to keep up the ferry,
 “ the Crown has granted to him the exclusive right of
 “ ferrying within certain limits. There is nothing in the
 “ nature of this transaction which would lead me to believe
 “ that the Crown intended to guarantee, or had power to
 “ guarantee, the grantee of the ferry against changes of
 “ circumstances and future discoveries of an entirely dif-
 “ ferent description of transit, by which ferrying might be
 “ superseded. The Crown professes to protect the grantee
 “ against the competition of other persons who are in the
 “ same line of business and do the same thing that he
 “ does; but he appears to run the risk of any change of
 “ circumstances which may render ferrying at that place
 “ useless.

“ There is no doubt, however, that the right of the
 “ owner of a ferry does extend somewhat beyond a mere
 “ right to bring an action against persons who have
 “ carried goods or passengers for hire by boat, from one
 “ terminus of his ferry to the other; and it is necessary to
 “ examine the authorities, for the purpose of seeing what
 “ the true limit of the right is. We have not been able
 “ to discover that any action has ever been brought by the
 “ owner of a ferry against any person for violating his
 “ right, otherwise than by means of boats. The authori-

¹ 1 Salk. 12.

“ties, both old and new, are all collected in *Huzzey v. Field*,¹ and *Newton v. Cubitt*;² but they all relate to alleged infringements of the rights of the owner of a ferry, by means of boats. They establish that, although it is laid down in a very early case,³—‘If I have a ferry by prescription, and another erects another ferry on the same river near to it, by which my ferry is injured, that is a nuisance to me; for I am bound to sustain and repair the ferry for the ease of the lieges; otherwise I shall be grievously amerced,’—and there are other authorities to the same effect; yet it does not conclusively follow, as a matter of law, that, because a new ferry diverts some of the traffic from an old ferry, it is actionable; and it may be that no action can be maintained in respect of the new ferry, if it has been set up *bonâ fide*, for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry. In *Newton v. Cubitt*,⁴ there were two counts; the first complaining that the defendant had carried passengers in the line of the plaintiff’s ferry; the second, that they had so done near the said ferry, for the purpose of evading it; and Mr. Justice Willes, after showing that the defendants had not carried passengers in the line of the plaintiff’s ferry, says: ‘The second count, charging that the defendants carried near the line of ferry, for the purpose of evading it, raises another question. The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way; and if the alleged wrongdoer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no material difference to travellers, such a wrongdoer would be guilty of

¹ 2 C. M. & R. 432.

³ 2 Roll. Abr. 140.

² 12 C. B., N. S. 32; 31 L. J., C. P. 246.

⁴ 12 C. B., N. S. 32; 31 L. J., C. P. 246.

“ ‘the wrong complained of in the second count; he
“ ‘would indirectly carry in the line of the plaintiff’s
“ ‘ferry.’¹ Further on he says: ‘The principle by which
“ ‘to decide, whether the proximity of a new passage
“ ‘across the water to an ancient ferry is actionable, has
“ ‘not been clearly laid down. It seems reasonable to
“ ‘infer that if the franchise of a ferry is established for
“ ‘facility of passage, and if the monopoly is given to
“ ‘secure convenient accommodation, a change of circum-
“ ‘stances creating new highways on land would carry
“ ‘with it a right to continue the line of those ways across
“ ‘a water highway; and it is obvious that the single
“ ‘landing-place which sufficed for an uninhabited marsh,
“ ‘would be utterly inadequate for several towns thronged
“ ‘with industrial mechanics.’ Now this being the result
“ ‘of the authorities, it seems to us by no means clear that
“ ‘a person building a bridge over a stream, even in the
“ ‘line of a ferry, would be liable to an action by the
“ ‘owner of a ferry. It is true that the opening a new
“ ‘bridge might be as prejudicial, or indeed, much more
“ ‘prejudicial, to the property of the owner of the ferry,
“ ‘than the setting up of a rival ferry; but one does, and
“ ‘the other does not, involve the direct doing of the very
“ ‘thing, the exclusive right to do which has been granted
“ ‘to the owner of the ferry: and it seems to be extending
“ ‘the principle of liability for an indirect violation of the
“ ‘rights of the owner of a ferry to an unreasonable extent,
“ ‘to hold that it extends to make a person liable to action,
“ ‘who has not ferried or carried passengers by boat at
“ ‘all.’”

After noticing that the railway bridge in question did *not* join the highway on which one terminus of the ferry was situate to the highway on which the other terminus was situate, and that the passengers and goods conveyed over the railway bridge did not use the highway on each

¹ 12 C. B., N. S., at p. 59; 31 L. J., C. P. at p. 253.

side of the river adjoining the ferry at all, his lordship points out that the passages cited from Mr. Justice Willes' judgment in *Newton v. Cubitt*, seem strongly in the defendant's favour, and continues: "From what is there said, it would follow that, even if the railway bridge had never been made, but the railway company had established a new ferry for the purpose of conveying goods and passengers from their railway on one side of the river, to their railway on the other side, it would not have been actionable, for the railway would have been a new highway on land, which a change of circumstances had rendered necessary, and it would be reasonable that the new highway should be allowed to be continued over the water highway."

Further on his lordship thus comments on the question of compensation to the owners of ferries in such cases. "There is another consideration which seems to us to be in favour of the defendants. If owners of ferries are held entitled to compensation, they will certainly form a singular exception to all other persons who were the owners of highways or had a legal interest in the profits to be derived from the use of highways before railways were invented. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways, and who have suffered loss from the diversion of traffic from those highways to railways; proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls, have all suffered great losses from the diversion of traffic to railways, and have received no compensation. No doubt their rights have not been infringed, though their property has been affected. They were all in substance the owners of particular kinds of highway. If any person used their highway without their permission, without paying their toll, the law gave them a remedy; but they had no remedy for a diversion of traffic caused by the invention

Question of compensation to owners of ferries for loss by creation of new highways considered.

Prerogative
of the Crown
as respects
owners of
bridges simi-
lar to that as
to ferries.

“ of a better kind of highway. Is the owner of a ferry in
 “ a different position? We think he is not. We think
 “ he also is the owner of a particular description of high-
 “ way, who is entitled to his legal remedy if anybody
 “ infringes upon his right, or uses his highway, without
 “ paying his toll; but that he, like the others, must bear
 “ the loss occasioned by the diversion of traffic caused by
 “ the introduction of railways. Another class of persons
 “ interested in highways may be referred to, more analo-
 “ gous to the owners of ferries. The Crown had exactly the
 “ same prerogative respecting bridges that it had respecting
 “ ferries. Suppose that the Crown had, in consideration
 “ of a person undertaking to keep perpetually in repair a
 “ bridge over a stream carrying a highway, granted to
 “ such person and his heirs a reasonable toll in respect of
 “ all persons and goods passing over the bridge; or, in
 “ other words, assume the existence of a good toll thorough
 “ in respect of a bridge. The owner of the toll would be
 “ possessed of a franchise exactly similar to that of the
 “ owner of a ferry, and would be liable to be indicted if
 “ he did not keep the bridge in repair; but would he be
 “ entitled to compensation on account of traffic having
 “ been diverted from his bridge by a new railway? It is
 “ difficult to suppose that he would, for his right to receive
 “ toll in respect of all persons and goods passing over his
 “ bridge has not been violated in the least. On the whole
 “ we are of opinion that no action could have been main-
 “ tained by the plaintiff in respect of the railway bridge if
 “ it had been opened without the authority of an Act of
 “ Parliament.” Their lordships held, that *Newton v.*
Cubitt governed also the question of the footbridge, and
 ordered judgment with costs to be entered for the defen-
 dants.

From the above remarks it will be evident that the owner of a ferry enjoys a monopoly with respect to a certain class of highway, and that though entitled to maintain an action for infringement of his right, he

cannot do so for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.

As was stated above, the owner of a ferry is liable for injury to the rights of subjects of the realm for wilful obstruction or neglect of duty.¹

Liability of lessees and owners of ferries for injury by negligence.

In *Willoughby v. Horridge*,² the lessees of a ferry provided steam boats for the conveyance of passengers, goods, and cattle, and also slips for landing and embarking them, which were generally sufficient for that purpose. It was held, that they were liable for an injury to a passenger's horse in consequence of the side rail of the landing slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the owner's control and management.

A common carrier by water stands on the same footing as a common carrier by land.³

A common carrier by water is on the same footing as one on land, and does not insure against the irresistible act of nature.

The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself, or both taken together; and if he can show that either the act of nature or the defect of the thing itself, or both taken together, formed the sole, direct, and irresistible cause of the loss, he is discharged.⁴

In *Walker v. Jackson*, it was held, that a contract to carry and land a carriage and jewellery, could not be implied from the mere character of the defendants as owners of the ferry, but that it was a question for the jury whether there was in fact such a contract.⁵ The plaintiff went on board defendants' steam ferry boat with his horse and carriage paying defendants' charge for a light four-wheeled phaëton. Jewellery and watches of great value were in a box under the seat, which defendants did not know. The carriage was taken safely across the river, but on landing fell into the

¹ See *ante*, p. 487; Stephen's Blackstone, vol. i. pp. 683, 684; Willes, 512, n.; *Payne v. Partridge*, 1 Show. 231; 2 Roll. Abr. 140.

² 12 C. B. 742.

³ *Rich v. Kneeland*, Cro. Jac. 330; Hob. 17.

⁴ *Nugent v. Smith*, 1 C. P. D. 423; see the judgments in this case, in which the law as to the liability of carriers was fully reviewed.

⁵ 10 M. & W. 161.

river and the jewellery was injured. It was held, that the plaintiff's right of action was not affected by his not having communicated the fact that the jewellery was in the carriage: that if a contract to land was established, it was a question for the jury whether the landing was complete under the circumstances; and also that to rebut usage to take and land carriages, a notice not visible to those who came in carriages, that defendants did not undertake to land carriages and would be responsible for no injury, was not admissible.

Neglect of
duty will
not justify
disturbance.

To an action on the case for disturbance of the plaintiff's ferry by the defendant plying a boat from and to the same places, from and to which the plaintiff's ferry plies, it is no answer to prove that plaintiff had neglected his ferry to the inconvenience of the public before the establishment of that of the defendant, or to show that 2*d.* had been of late demanded and taken by the plaintiff, whereas formerly only 1*d.* was taken.¹

Ferry tolls.

*Anguish v. Ebdon*² was an action for *toll* brought by the owner of an ancient ferry, at the trial of which it transpired that the plaintiff had leased the tolls of the ferry for a term of years, but that the lease was not under seal. The counsel for the defendant submitted that the plaintiff should be nonsuited; but the learned judge was of opinion that tolls lying in grant and not in tenure, no interest in law passed by the agreement for letting the tolls because it was not under seal, and that the action was therefore maintainable. If the plaintiff had sued for an injury done to his interest as a reversioner in the ferry, he would have been defeated for want of proof of an existing valid lease. The plaintiff recovered.

Lord Coke³ defines "*passage*" as a ferry for the passage of men and cattle over water, for which the owner has

¹ *Peter v. Kendal*, 6 B. & C. 703; see Gunning on Tolls, p. 110. See also *Anguish v. Ebdon*, Bury Summer Assizes, 1830, cor. Parke, J.

² Bury Summer Assizes, 1830, cor. Parke, J. Cf. *Duke of Somers-*

set v. Fogwell, 5 B. & C. 875; *R. v. North Duffield*, 3 M. & S. 247; see Gunning, p. 111.

³ In *Jehu Jebb's case*, 8 Rep. 46; see Gunning, p. 106.

a toll; but it has been said in an old case¹ that a ferry is in respect of the landing-place, and not of the water. The water may belong to one and the ferry to another,—as it is of ferries on the Thames, where in some places the Archbishop of Canterbury has the ferry, and the Lord Mayor of London the interest in the water.²

The individuals or all the inhabitants of a particular town may, by custom, have a right of passage over a ferry without paying toll; for such a custom may reasonably have had its origin in an agreement that the inhabitants of the town should be at the charge of procuring the grant, and that, in consideration of that, another should provide a boat and take toll at the ferry of all but the inhabitants, and that they should pass toll free. Such an agreement would be good at this day, and the interest of the owner of the ferry would be encumbered with the discharge of the inhabitants of the town from toll for passing over the ferry in his boat.³

Bridges.

Wharton⁴ defines a bridge to be “a building of brick, stone, wood, or iron across a river, ditch, valley, or other place for the convenience, ease, and benefit of travellers.”

In early times the expense of repairing bridges was part of the *trinoda necessitas*, to which, in accordance with feudal laws, every man's estate was subject,—viz. *expeditio contra hostem, arcium constructio, et pontium reparatio*.⁵ According to Blackstone,⁶ the reparation of bridges included that of roads; and hence every parish is bound to keep the high roads passing through it, and, con-

Definition.

Repair at common law in early times part of the *trinoda necessitas*.

¹ *Inhabitants of Ipswich v. Browne*, Saville, 11; see Gunning on Tolls, p. 106.

² Gunning, p. 106.

³ *Payne v. Partridge*, Carth. 191; 1 Show. 243, 255; 3 Mod. 289; 1 Salk. 12; Comb. 180; Holt, 6; see Gunning, p. 107.

⁴ Wharton's Law Lexicon, 4th ed. p. 144.

⁵ Stephen's Blackstone, vol. iii. 6th ed. p. 242; Bl. Com. 16th ed. vol. i. p. 357.

⁶ Bl. Com. vol. i. p. 357. As in the Roman law: “ad instructiones reparationesque itinerum et pontium nullum genus hominum, nulliusque dignitatis ac venerationis meritis cessare oportet;” c. 11, 74, 4.

sequently, the bridges, in good and sufficient repair. But while the care of roads still devolves on parishes, that of bridges has passed for the most part to the counties at large in which they are situate.¹

Statutory
provisions.
Magna
Charta.

22 Hen. VIII.
c. 5.

Sect. 2.

By Magna Charta,² it was provided "that no town or freeman shall be distrained to make bridges nor banks but such as of old time and of right have accustomed to make them in the time of King Henry our grandfather;"—and the liability of individuals or particular places to repair *ratione tenuræ*³ was thus fixed, and the feudal burthen somewhat alleviated. The liability of the county at common law to repair was fully affirmed⁴ by the passing of 22 *Hen. VIII. c. 5*,⁵ whereby "justices of peace" were "empowered to inquire of repairs of bridges and award process against offenders as the king's justices of his bench use commonly to do, or as it shall seem by their discretion to be necessary and convenient for the speedy amendment of such bridges" (sect. 1). By sect. 2, in order to ascertain what persons shall be liable to the repair of bridges, it is enacted—1st, that if the said bridges are without a city or town corporate, they shall be made by the inhabitants "of the shire or riding within which the said bridge decayed shall happen to be;" 2nd, "If within the city or town corporate, then by the inhabitants of every such city or town corporate;" and 3rd, "If part of any such bridges decayed happen to be one in one shire, riding, city, or town corporate, and the other part thereof in another shire, riding, city, or town corporate, or if part be within the limits of any city or town corporate, and part without or part within one riding and part within another,

¹ Stephen's Blackstone, 6th ed. vol. iii. p. 242; Viner's Abridgment, Bridges; and see *Re Newport Bridge*, 2 Ell. & Ell. 377.

² 9 Hen. III. c. 15 (Ruff.).

³ See *Baker v. Greenhill*, 3 Q. B. 148; *Reg. v. Bedfordshire*, 4 Ell. & Bl. 535; Stephen's Blackstone,

vol. iii. p. 242; see *post*, p. 527; Mag. Car. c. 15, applies only to the making and not to the repairing of Bridges; *Rex v. West Riding of Yorkshire*, 5 Burr. 2594.

⁴ 1 Bl. Com. p. 357, n. 15.

⁵ An Act concerning the amendment of bridges in highways.

“that then, in every such case, the inhabitants of the shires, ridings, or towns corporate shall be charged and chargeable to amend, make, and repair such part and portion of such bridges so decayed as shall be and be within the limits of the shire, riding, city, or town corporate wherein they be inhabited at the time of the same decays.”

Sect. 7 makes provision for the repairing of highways at the end, making the liability for repair extend to “such part and portion of the highways in every part of this realm as well within franchise as without, as lie next adjoining to any ends of any bridges within this realm distant from any of the said ends by the space of 300 feet.”¹

Of the numerous important statutes relating to bridges,²

¹ Cf. *R. v. W. Riding, Yorkshire*, 2 East, 342; *R. v. Inhabitants of the County of Kent*, 2 M. & S. 513; *Rex v. West Riding of Yorkshire*, 7 East, 588; Bl. Com. vol. i. p. 357, note 15. See also *post*, p. 526.

² The following are some of the principal:—

1 *Ann. st. 1, c. 12* (in *Ruff. c. 18*).

“An Act to explain and alter the Act made in the 22 Hen. VIII. concerning repairing and amending of bridges in the highways, and for repealing an Act made in 23 Q. Eliz. for the re-edifying of Cardiff Bridge in the county of Glamorgan, and also for changing the day of election of the wardens and assistants of Rochester Bridge.”

Sect. 1 recites 22 Hen. VIII. c. 5, and states that the mode of collecting and taking money for the repair of bridges established thereby (viz. through constable or two honest inhabitants) had been found very troublesome, burdensome and chargeable to the several counties, cities, towns corporate, ridings and divisions.

Sect. 3 therefore proceeds to enact, that the justices at general or quarter sessions may assess

towns for repair and maintenance of bridges, but that such assessments are to be levied by the constable of each parish, township, hamlet, or vill in such manner as the said justices may direct, and are then to be paid to the high constables of hundreds, who are in their turn to pay the same to such person and persons as the said justices by their order at sessions shall appoint to be treasurers and receivers of the same. The assessments are to be levied by distress and the sale of goods of every person so assessed not paying the same within ten days after demand, rendering the overplus of the value of the goods so distrained to the owner and owners thereof, the necessary charges of making and selling such distress being first deducted.

By sect. 3, high constables, churchwardens, &c. neglecting to assess, &c. are subject to a penalty of 40s., and every treasurer, unduly paying money, to a penalty of 5l.

Fines, &c. are to be returned into the Exchequer, paid to treasurers appointed by quarter sessions, and applied in repair of bridges, &c. (sect. 4).

22 Hen. VIII.
c. 5, s. 7.

5 & 6 Will.
IV. c. 50, s.
21.

the 5 & 6 Will. IV. c. 50 (*The Highways Act, 1835*), requires to be noticed. By sect. 21 it is enacted, "That if

Sect. 5 provides that matters concerning such repairs are to be determined in the county where they lie, and not elsewhere; and that no presentment or indictment for not repairing such bridges or the highways at the end of such bridges shall be removed by *certiorari* out of the said county into any other court.

Sect. 6 regulates the allowance made to persons executing the Act, and sect. 7 permits parties in actions under the Act to plead the general issue.

Sect. 8 provides that neither this Act nor anything therein contained, shall excuse or discharge any particular persons, estates or places from repairing any bridge which they have heretofore usually repaired.

43 Geo. III. c. 59.

"An Act for remedying certain defects in the laws relative to the building and repairing of county bridges and other works maintained at the expense of the inhabitants of the counties in England" (1803).

This Act, called Lord Ellenborough's Act, was passed in consequence of the decision of the Court of Queen's Bench in *Rex v. West Riding, Yorkshire* (2 East, 342).

Sect. 1 empowers surveyors of county bridges to get materials for the repair of bridges in the same manner as surveyors of turnpike roads, and to remove obstructions and annoyances therefrom in the same manner as surveyors are entitled to do under 13 Geo. III. c. 78.

By sect. 2, the justices at quarter sessions may make orders for the widening and altering the situation of county bridges, and may purchase land for such purposes.

By sect. 3, it is enacted that the right and property of all tools, implements, timber, bricks, stones, gravel, and other materials purchased, gotten, or had, or to be

purchased, gotten, or had, by the order of the justices in counties, or the surveyor of county bridges, shall be vested in the said surveyor.

The inhabitants of counties shall and may, by sect. 4, sue for damages done to bridges, &c. in the name of their surveyor, and shall and may be sued in his name; provided always that every such surveyor in whose name any action or suit shall be commenced, prosecuted, or defended in pursuance of this Act shall always be re-im-bursed and paid out of the monies in the hands of the treasurer of the public stock of such county respectively all such costs and charges as he shall be put unto or become chargeable with by reason of his being so made plaintiff or defendant therein, and also all the costs and charges of prosecuting any indictment or indictments, or other proceedings against any person or persons whomsoever.

Sect. 5 describes the bridges which inhabitants of counties shall be liable to repair and maintain, it being provided that such bridge must be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or persons appointed by the justices of the peace at the general quarter sessions assembled, or by the justices of the peace of the county of Lancaster at their annual general sessions; see *Rex v. Derby*, 3 B. & Ad. 147; *Rex v. Lancashire*, 2 B. & Ad. 813; *Rex v. Devon*, 2 N. & M. 412; *Reg. v. Gloucester, Car.* & M. 516; *Reg. v. Southampton*, 18 Q. B. 841.

Sect. 6 regulates the orders, &c. respecting county bridges in the county of York, and

Sect. 7 provides that the Act shall not extend to bridges repaired by reason of tenure or by prescription.

Other enactments are:—5 Will. & M. c. 11, s. 6; 12 Geo. II. c.

“any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of a county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road who were by law before the erection of the said bridge bound to repair the said highways: provided, nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks, or fences of the raised causeways, and raised approaches to any such bridge or the land arches thereof.”¹

By sect. 5 of the same Act, the word “highway” shall be understood to mean all roads, *bridges (not being county bridges)*, carriage ways, cart ways, horse ways, bridle ways, foot ways, cause ways, church ways, and pavements; and by sect. 22, it is enacted “that the several powers and authorities hereby vested in the surveyor of highways, as well for the getting of materials as the preventing and removing of all nuisances and annoyances, shall be and the same are hereby vested in the surveyor of county bridges, and the roads at the ends thereof repairable therewith; and the several penalties, forfeitures, matters, and things in this Act contained relating to highways shall be and the same are hereby extended and applied, as far as the same are applicable, to such bridges, and the roads at the ends thereof as aforesaid, the said surveyor or surveyors of county bridges making satisfaction and compensation for all trespass and damage done in the execution of the powers of this Act, in such and the same manner as the surveyors of highways are required to make under the provisions of this Act.”

29, s. 14; 14 Geo. II. c. 33; 13 Geo. III. c. 78; 52 Geo. III. c. 110; 54 Geo. III. c. 90; 55 Geo. III. c. 143. See Chambers' "Law relating to Highways and Bridges,"

passim, for a digest of statutes and cases on this subject.

¹ See, too, Stephen's Blackstone, vol. iii. p. 243.

Passing over 4 & 5 *Vict. c. 49*, a statute enabling money for the repair of county bridges to be borrowed on credit of the county rate;¹ and 13 & 14 *Vict. c. 64*, which regulates the repair of bridges in cases where a borough, and not a county, is liable;² the next statute of importance is 24 & 25 *Vict. c. 97*,³ sect. 33 of which provides that—
 Whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping.⁴

33 & 34 *Vict.*
c. 73, s. 12.

By sect. 12 of 33 & 34 *Vict. c. 73*, it is provided that where a turnpike road shall become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly.⁵

Provided that, for the purposes of this Act, such bridges

¹ “An Act to provide for repairing, improving, and rebuilding county bridges” (1841), sect. 42 (repealed in part). See *Steph. Com. vol. iii. p. 242, n. (h)*.

² “An Act to provide for more effectually maintaining, repairing, improving, and rebuilding bridges in cities and boroughs” (1856), (repealed in part). See *Steph. Com. vol. iii. p. 242, n. (h)*. The construction of railway bridges is regulated by 8 & 9 *Vict. c. 20* (*The Railways Clauses Consolidation Act, 1845*), sects. 46—52,

and sects. 65—67.

³ “An Act to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property.”

⁴ As to the punishment of penal servitude, see sect. 2 of 27 & 28 *Vict. c. 47*.

⁵ “An Act to continue certain Turnpike Acts in Great Britain, to repeal certain other Turnpike Acts, and to make further provisions concerning turnpike roads” (1870).

shall be treated as if they were bridges built subsequently to the passing of the Act of the fifth and sixth years of his late Majesty King William the Fourth, chapter fifty, intituled "An Act to consolidate and amend the laws relating to highways in that part of Great Britain called "England."

By sect. 144 of 38 & 39 *Vict. c. 55*,¹ the powers of surveyors of highways and of vestries under the last-named Act are vested in the urban authority of the district within such district; and sect. 147 empowers such authority to construct or adopt public bridges, &c. over canals, railways, and by agreement with the proprietor.

It may be noted in concluding this brief enumeration of statutes relating to bridges, that by sect. 1 of 40 & 41 *Vict. c. 14*,² it is enacted that on the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses, and compellable to give evidence.

Sect. 21 of 41 & 42 *Vict. c. 77* provides that certain existing bridges may be accepted by county authorities, and by sect. 22, contributions out of county rates towards erecting bridges may be made by the county authorities in accordance with the provisions of sect. 5 of 34 *Geo. III. c. 59*.³

The general mode in which the common law liability with regard to bridges has been confirmed and amplified by statutes having been thus briefly indicated, it will be

¹ The Public Health Act, 1875; see sects. 145 and 148; and as to highway board meetings, sect. 343, and sched. 5, part 3.

² "An Act for the amendment of the law of evidence in certain

"cases of misdemeanour."

³ "An Act to amend the law relating to highways in England, and the Acts relating to locomotives in roads, and for other purposes."

necessary to examine more particularly some points *as to such liability to repair*.

A bridge of public utility is to be repaired at the public expense;¹ for, "if a man builds a bridge, and it becomes useful to the county, the county in general shall repair it."²

The onus of repair being therefore divided between the public represented by the county and individuals or bodies of individuals, we shall proceed to consider: (i.) *The liability of the county to repair*; (ii.) *The liability to repair ratione tenuræ*; and (iii.) *The liability to repair by prescription*.

Under the first heading it will be necessary to examine what is meant by the terms public user, and what structure can legally be described as a bridge, as well as to examine the rules with regard to bridges built under special authority, and the statutory provisions as to public liability.

Liability of
county to re-
pair.

As a general rule the county is liable to repair bridges built by private individuals before 43 *Geo. III. c. 59*, if the public use such bridges.³

Bridges of
public utility.

But where a bridge has been rendered necessary in consequence of an authorized interference for private purposes with a public highway, and the user of the bridge by the public has been so rendered necessary by such interference, the parties so interfering with the original highway, and not the county, are bound to keep the bridge in repair.⁴

¹ *Rex v. W. R. Yorkshire*, 5 Burr. 2594; 2 Sir W. Bl. 685; Lofft. 238; 2 East, 342.

² *Ib.* Per Mr. Justice Aston.

³ If no man, by reason of tenure or otherwise, ought to repair a bridge, the county ought to do it; *County of Huntingdon case*, Pep. 192; *Reg. v. Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 14 Jur. 956; 19 L. J., M. C. 223; *Reg. v. Saintiff*, 6 Med. 255.

⁴ *Ib.* Where, therefore, to an

indictment against the inhabitants of a county for non-repair of a bridge, the plea showed that certain adventurers had, for the purpose of draining lands for their own benefit, and under certain powers vested in them, cut an artificial drain or river, which intersected and obstructed an immemorial highway, and that they had erected the bridge in question over the said drain, in the line of the former highway, and not upon

This principle is confirmed by the remarks of Blackburn, J., in *Reg. v. Kitchener*.¹ "At common law the "highways within a parish or township were repairable

the ancient course of any river, and that the former highway had been thenceforth carried over the bridge; and that after the making of the bridge the said drain and bridge and large quantities of land, for the purpose of draining which the said drain was made, were vested by Act of Parliament in a certain corporation in trust for the said adventurers, with power to the corporation to levy money for maintaining the works, and that the drain was very useful to the adventurers and to the corporation, and had been always maintained for their benefit, and that since the passing of the said Act the drain and bridge had always been vested in the corporation, and retained by them for their own benefit, and for that of the said lands vested in them, and for furthering the purposes of the said corporation, and that the said corporation were liable to repair, and of right ought to repair, the said bridge; it was held that the plea showed a liability in the corporation to repair the bridge, by reason of such bridge having been rendered necessary through the interference for private purposes with a public highway, and that it furnished a defence to the indictment:—Held, also, that the allegation that the bridge and drain were vested in the corporation did not make the plea double; *Reg. v. Ely*, 4 New Sess. Cas. 222. Cf. as to this, *Rex v. Kent* (13 East, 220), and *Rex v. Lindsey* (14 East, 317); and see also decision mentioned in 1 Roll. Abr. 368, tit. "Bridges," pl. 2; 2 Inst. 761; *Rex v. Salop*, 13 East, 95; *Reg. v. Kerrison*, 3 M. & C. 526; *Reg. v. Ely*, 4 New Sess. Cas. 222; *Rex v. Oxfordshire*, 6 D. & R. 321; 4 B. & C. 194; *Rex v. W. R. Yorkshire*, 2 East, 342; *Rex v. Kent*, 2 M. & S. 573. The dictum in the case 1 Roll. Abr. is:—If a man erects a mill

for his own profit, and makes a new cut for the water to come to it, and makes a new bridge over it, and the subjects use to go over this as over a common bridge; this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit. Patteson, J., in *Reg. v. Ely*, observes with reference to the judgment of Lord Ellenborough in *Rex v. Kent* (2 M. & S. 513), that—"Lord Ellenborough in delivering judgment seems to admit that it was a decision contrary to the case, 1 Roll. Abr. 368, Bridges, pl. 2; but states that, in reference to the record, Rolle appeared not to have been warranted in the abstract given by him; indeed, that no such question as he supposed had been raised or decided in it. Considering the great learning and accuracy of Rolle, and the greater familiarity which he undoubtedly had with ancient records than could be expected of the Court in Lord Ellenborough's time, so entire a blunder as is charged upon him may well excite surprise, and it was pointed out by Mr. Maude, for the defendants, that whereas Rolle refers to a record of 8 Edw. II., the roll examined by the Court from which an extract is given in 2 M. & S. 520, is of the 6 Edw. II.; and the result of his industrious research leaves it very questionable whether the Court in *Rex v. Kent*, did successfully dispose of the authority in Rolle, &c. . . . It would be safer, therefore, perhaps to rely neither on the case in Rolle, nor in the mere decision in *Rex v. Kent*, further than as a general affirmation of the general rule."

¹ 29 L. T., N. S. 697; 12 Cox, C. C. 522; 43 L. J., M. C. 9. As to term highway, cf. *Reg. v. Saintiff*, 6 Mod. 255; Holt, 129; and see *post*, p. 518.

“by the inhabitants of the parish or township, and where
 “they were carried across small streams the inhabitants of
 “the parish or township were probably by immemorial
 “custom also liable to repair the bridges. But the
 “bridges over large streams were repairable by the in-
 “habitants of the county. In the case of *Reg. v. Ely* (19
 “L. J., M. C. 233), it was held that he who, under lawful
 “power, makes an artificial cut through a highway, and in
 “whom the cut is vested for his own advantage, incurs
 “the obligation to repair the bridge over the highway,
 “yet not so as to relieve the parish or township from
 “liability, for the Queen’s subjects are not to be deprived
 “of their right of coming on the parish or township to
 “repair.”¹

What is a
 public bridge.

A bridge may be a public bridge which is used by the public at all such times as are dangerous to pass through the river;² but it is competent to a county, upon an indictment for non-repair of a public bridge, to give evidence of the bridge having been repaired by private individuals.²

Where a person forty-five years back erected a mill and dam thereto for his own profit, *per quod* he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller afterwards built a bridge over it, which the public had ever since used:—Held, that the county and not the miller were chargeable with the reparation.³

A bridge used only on an occasion of floods and lying out of and alongside the road commonly used has been held to be a public bridge;⁴ but a bar across a public bridge kept locked except in time of flood is conclusive evidence that the public have only a limited right to use the bridge at such times; and if an indictment for not keeping it in repair states that it is used by the king’s

¹ Cf. *post*, p. 520.

² *Reg. v. Northampton*, 2 M. & S. 262.

³ *Reg. v. Kent*, 2 M. & S. 513.

⁴ *Reg. v. Devon*, R. & M. 144 (Abbott).

subjects "at their free will and pleasure" the variance is fatal.¹

The word "riding" in the Statute of Bridges (22 *Hen. VIII. c. 5*) is not confined to districts technically called ridings, but comprises every division of a county which corresponds in its definition to a riding.² Similarly, a hundred bridge has been held to be a county bridge and

¹ *Rex v. Marquis of Buckingham and others*, 4 Camp.

In *Rex v. Devon*, the bridge in question was approached by a causeway lying alongside the main road, which led through a ford close by and below the bridge. The bridge and causeway were open at all times to carriages, &c., but only used by the public in cases of floods, which rendered the ford impassable, and in high floods the bridge itself was impassable. There was, moreover, no evidence that the bridge had ever been repaired, though its existence was spoken to for sixty or seventy years by old witnesses.

With regard to *Rex v. Marquis of Buckingham*, the indictment alleged that the bridge was "used for all the liege subjects of our lord the king and his predecessors, with their horses, carts and carriages, to go, return, pass, ride and labour at their free will and pleasure." Lord Ellenborough observed—"A bar kept shut and opened as this is I think conclusively shows that the public have only a right to use the bridge at times of flood. It is easy to see how such a qualified right might be created, and there is no objection to its legality. But the indictment sets out a right without limit or qualification. . . . Therefore, though the defendants may be bound, *ratione tenuræ*, to maintain this bridge to be used in times of flood, they must be acquitted upon the present indictment."

The case of *Rex v. Glamorganshire*, given in a note on *Rex v.*

W. R. Yorkshire (2 East, 356, n.), is instructive on this point.

An indictment having been removed in Hilary Term 1788, by writ of certiorari into the Court of King's Bench against defendants for not repairing a certain public bridge called *Inispenlwech* bridge, erected in the king's highway, across the river Tawe; the defendants pleaded, that in the year 1745 Herbert Mackworth, Esq., being seised of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge; and that he and Sir Herbert Mackworth his son, and their tenants of tin works, enjoyed a way over the bridge for their private benefit and advantage; and, therefore, that Sir H. Mackworth ought to repair and *absque hoe* that the inhabitants of the county ought not to repair. The prosecutor replied that the inhabitants of the county ought to repair. And upon the trial at the summer assizes for the county of *Hereford* before Lord Kenyon, the facts alleged in the plea were proved, and also that the business of the tin works could not be carried on without the use of the bridge. But it also appearing that the public had constantly used the bridge from the time of its being built, his lordship directed the jury to find a verdict for the Crown, viz., that the inhabitants of the county were bound to repair—which they did accordingly, and no motion was ever made for a new trial; vide *Bac. Abr.* 535, C.

² *Reg. v. Ely*, 4 New Sess. Cas. 222.

not a highway, under 5 & 6 *Will. IV. c. 50*, and therefore not repairable by a parish.¹

County only
bound to
repair bridges
erected over a
flumen vel
cursus aquæ.

The inhabitants of a county are bound by common law to repair bridges erected over such water only as answers the description of *flumen vel cursus aquæ* (i. e. water flowing between banks more or less defined), although such channel may occasionally be dry,² and need not necessarily flow at all times. In such case it is a question of fact whether an arch thrown over a *cursus aquæ* is such a bridge or not,³ and the decision will depend on the evidence brought to prove the repair of the structure, and the nature of the *flumen aquæ*.⁴

¹ *Reg. v. Chart, Inhabitants of*, 39 L. J., M. C. 107; 8 L. R., 1 C. C. 237.

² *Rex v. Oxfordshire*, 1 B. & Ad. 289; *Rex v. Derbyshire*, 2 G. & D. 97; 2 Q. B. 745; 6 Jur. 483; *Rex v. Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 C. & P. 208; 1 H. & N. 147.

³ *Rex v. Whitney*, 4 N. & M. 594. Per Patteson, J.: "With regard to *Rex v. Oxfordshire* (1 B. & Ad. 289), I do not understand that case as laying down that every arch thrown over a *cursus aquæ* is a bridge, but only as deciding that in order to constitute a bridge there must be a *cursus aquæ*."

⁴ "The question," said Lord Tenterden, C. J., in *Rex v. Oxfordshire*, B. & Ad. 289), "therefore, seems to turn upon the meaning of the words *flumen vel cursus aquæ*.* Now if these words be considered to denote waters flowing in a channel between banks more or less defined, although such channel may be occasionally

"dry—a rule will be established of general and easy application. If any other sense be put upon the words, great uncertainty and confusion will be introduced. It is of great importance to avoid uncertainty by the establishment of general rules. We think no better or more certain rule can be laid down than that which will be given by the sense thus attributed to the words, and, therefore, that such ought to be considered as the general rule of law. And consequently the verdict should be entered for the defendants, the county not being in our opinion bound to repair the structures in question."

In the above case the road by which a bridge was approached passed between meadows which were occasionally flooded by a river, and, for convenient access to the bridge, a raised causeway had been made having arches or culverts at intervals for the passage of the flood water, which were equally necessary to the safety of

* In 2 Inst. 701, Lord Coke, in commenting on the Stat. of Bridges 22 Hen. VIII., says the ancient form of an indictment on this statute is:—"Quod pons publicus et communis situs in altâ regiâ viâ super flumen sen cursum aquæ, &c.;" see 1 B. & Ad. 294, 301.

In *Rex v. Oxfordshire, Inhabitants of*, a case of a similar nature (1827), Bayley, J., says, "By the Stat. of Bridges, the bridge must be in the highway to render the county liable, and the county is liable, because the bridge gives a passage along the highway."

A floating bridge which consists of a vessel propelled by steam from one side of the river to the other, and is kept

A floating bridge is in substance a

the main bridge and the causeway; and it was held, as has been stated, that the inhabitants of the county were not bound to repair such arches, being at the distance of more than 300 feet from the end of the main bridge.

This case may be usefully contrasted with *Rex v. Derbyshire* (2 G. & D. 97). There a structure, called Swarkestone Bridge, was 1,275 yards along, and at the eastern end were five arches under which the river Trent flowed, while at the western end were eight arches under one of which a stream constantly flowed. The rest of the structure consisted of a raised causeway at different intervals, in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood. There was no interval of causeway between the arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county for the non-repair of the structure, describing the whole as a bridge:—Held, that it was properly so described, and that the verdict was properly entered for the Crown.

Lord Denman, C. J., in delivering judgment, said:—"The present case differs from that of *Rex v. Inhabitants of Oxfordshire* (1 B. & Ad. 289, 297), in two respects—1st. That it is here found 'by the case that the county of Derby have from time immemorial repaired the whole structure, the road and battlements, from beginning to end, including the whole forty-two arches, as also 300 feet at the eastern extremity of the same, and have at different times, and at a great expense, rebuilt and widened twenty-two of the twenty-nine arches between the eight and five arches;' also, 'that from

"the year 1750 various parts of the said structure, other than the said five arches over the Trent, have been frequently presented under the name of Swarkestone Bridge by the grand jury as out of repair, and such parts have been repaired accordingly: 'whereas in the case of *Rex v. Inhabitants of Oxfordshire*, it was not shown that the disputed arches had been repaired by the county; 2ndly. It appears by this case that there is a constant flow of water under one of the eight contiguous arches at the western end of the structure, which, therefore, would be a county bridge, independent of their connection with the arches over the Trent; and also that most of the other twenty-nine arches are over water continually there, though stagnant, whereas in *Rex v. Inhabitants of Oxfordshire* the disputed arches stood on dry ground, except at times of flood. We do not consider it necessary to consider the second difference, or to examine whether an arch or number of arches constructed across stagnant water, ought to be treated as constituting a bridge, or whether it is necessary that there should be '*flumen vel cursus aquæ*' for that purpose, because we think that the first difference is sufficient to take this case out of the authority of *Rex v. Inhabitants of Oxfordshire*, and to entitle the Crown to our judgment.

"That case was tried twice. Upon the first occasion the indictment treated each of the arches as a separate bridge, and the Court held that to be wrong; but Mr. Justice Bayley, in giving his judgment, used these words (1 B. & Ad. 299, note): 'It is said that these arches are part of the bridge. There might be strong ground for coming to that conclusion, if it had appeared that they were

ferry, not a bridge.

in its course by chains laid down across the bed of the stream, is in substance a ferry, and is not a "bridge" within

"erected at the same time as the main bridge, or if the inhabitants of the county had from time to time repaired 300 feet of the road beyond these arches, which (if they were part of the original bridge) they would have been liable to do. That is a matter of fact, and ought to have been decided by a jury. We cannot say that they necessarily are part of the bridge; and upon a special verdict we can only draw necessary conclusions."

"Upon the second occasion (1 B. & Adol. 289), the judgment treated the whole as one bridge, and the jury found a verdict for the Crown, which the Court set aside as being contrary to the evidence, and ordered a verdict to be entered for the defendants. None of those circumstances which Mr. Justice Bayley had mentioned in his former judgment as forming strong ground for coming to the conclusion that the arches were part of the bridge, were proved on that second occasion."

"Here, on the contrary, it appears that the whole structure has from time immemorial been treated as one bridge; that the whole of it from beginning to end has been immemorially repaired by the county; and indeed that twenty-two out of the twenty-nine arches in dispute have actually been rebuilt by the county. The facts, therefore, of this case are conclusive against the defendants to show that the whole structure is one bridge, unless there be some rule of law which, under all and any circumstances, prohibits every part of a structure from being treated as a bridge under which water does not flow at all times. No such rule of law is to be found unless it can be deduced from the decision in *Rex v. Oxfordshire*. Looking at all the circumstances

"of that case, we do not think that any such rule can properly be deduced from that decision, notwithstanding the language used in the latter part of the judgment and the importance attached to the passage from 2 Inst. 701, and to the use of the words '*super flumen vel cursum aquæ*' in ancient indictments. Indeed, the confining of these words to a constant stream or course of water flowing at all times to the exclusion of flood waters, whether rarely or frequently occurring, is not altogether consistent with the doctrine laid down in a case in the same volume of reports, *Rex v. Trafford and others* (1 B. & Ad. 874). In that case the ancient course and outlet of flood water had been obstructed by certain fenders or banks, and the Court in giving judgment said, 'Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel, at all usual seasons; and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons the erection and continuance of these fenders cannot be justified. No case was cited or has been found that will support such a distinction.' This view of the law was agreed to by the Court of Exchequer *Chamheris* is reported in Bing. 210, though the judgment was reversed from the insufficiency of the special verdict. Now, if it be unlawful to obstruct the accustomed course of flood waters which flow only occasionally, it is difficult to see why a structure of arches made to carry a highway in such a manner as to

the meaning of sect. 72 of the Mutiny Act (27 *Vict. c. 3*), which exempts from the payment of any duties or tolls on embarking or disembarking from or upon any pier, wharf, quay, or turnpike, or other roads or bridges, otherwise demandable by virtue of any Act already passed or hereafter to be passed.¹

Sect. 7 of 24 & 25 *Vict. c. 70* (*The Locomotive Act*), enacts that where any bridge on a turnpike or other road, carried across any stream, watercourse, or navigable river, canal or railway, shall be damaged by reason of any locomotive passing over the same, or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, or other persons interested in, or having charge of, such navigable river, canal, or railway, or of such bridge, shall be liable to repair the damage, &c., but the same shall be repaired to the satisfaction of such proprietors, &c. by the owner or persons having charge of the locomotive at the time of the happening of such damage. This does not apply to county bridges.²

A bridge may be so situate as to be a street within the meaning of a statute.³

An indictment does not lie for not repairing a bridge

A bridge may be a street within meaning of a statute.

“permit flood waters to flow in
“their accustomed course should
“not be treated as a bridge, though
“at ordinary times there may be
“no water under them. At any
“rate, where, as in the present
“case, such arches are contiguous
“to, and, as it were, the continuation of, an acknowledged county
“bridge, and have been immemorially treated by the county as
“part of the bridge, no rule of
“law prevents our saying that
“they are so in point of law, as it
“is obvious that they are in point
“of fact.

“For these reasons we are of
“opinion that the whole of this
“structure must be taken to be one
“county bridge, and that the verdict entered for the Crown must
“stand.”

¹ *Ward v. Gray*, 13 W. R. 653; 11 Jur., N. S. 738; 34 L. J., M. C. 146; 6 B. & S. 345.

² *Reg. v. Kitchener*, 29 L. T., N. S. 697.

³ *Beaver v. Manchester, Mayor of*, 26 L. J., Q. B. 311; 8 E. & B. 44; 29 L. T., O. S. 226. Declaration, that plaintiff was possessed of certain land forming part of the bed of a canal, and that defendants erected a bridge across the canal, and caused it and the walls adjoining to be so constructed that parts of the same extended and projected over parts of the canal. Plea, that several and all the matters and things complained of were lawfully done by the defendants under and by virtue of powers given to them by an Act made, &c. Held, plea in these general terms was good.

unless it be in a highway.¹ “*Highway*” is a general term for all public ways, as well cart, horse and footways,¹ common to all the Queen’s subjects.

Persons building bridges under special authority for their own benefit primarily liable to repair and maintain them.

As has been remarked above, if a bridge be of public utility,² and used by the public, the public must repair it; but where a bridge is built by an individual, or body of individuals, for his or their benefit, and constructed without public utility, or in order to restore to the public the use of a public way which such individual or body of individuals has obstructed, then the latter, and not the public, will be liable for the repair of such bridge.³

Thus, in the case of *Manley v. St. Helen’s Canal and Rail. Company*,⁴ a canal company empowered to make bridges (*inter alia*) were held bound to maintain a bridge sufficient for the present state of circumstances of the county and places through which their canal passed, and consequently liable for the death of a person drowned in their canal owing to the insufficient nature of the bridge.

Similarly, a dock company having a swing bridge on a public highway are bound in the passing of vessels to use all reasonable means (both as to the number of men employed, and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all that can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable to damages for the injury sustained.⁵

So, too, a railway company which is by Act of Par-

¹ *Reg. v. Saintiff*, 6 Mod. 255; Holt. 129; *Rex v. Salop*, 13 East, 95.

² A bridge built in a public way without public utility is a nuisance, and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding and repairing it immediately on the county: *Rex v. West Riding of Yorkshire*, 2 East, 342.

³ *Rex v. West Riding of Yorkshire*, 2 East, 342; *Rex v. Kerrison*,

3 M. & S. 526; *Rex v. Lindsay*, 14 East, 317; *Rex v. Kent*, 13 East, 220; *Rex v. Somerset*, 16 East, 305; *Manley v. St. Helen’s Canal*, 4 H. & N. 840; 27 L. J., Exch. 159; *Wiggins v. Boddington*, 3 C. & P. 544; *Nicholl v. Allen*, 31 L. J., Q. B. 283; 10 W. R. 741; 1 B. & S. 934; 6 L. T., Exch. 699.

⁴ 2 H. & N. 840; 27 L. J., Exch. 159.

⁵ *Wiggins v. Boddington*, 3 C. & P. 544.

liament authorized to construct any works is bound to construct them in such a way as not to cause a public nuisance, and if the company fails to do so, it will be compelled to alter the works so as to abate the nuisance caused, if it is not the necessary consequence of the exercise of the company's privileges.

The Furness Railway Company was by a special Act authorized (*inter alia*) to divert a road and to carry it under the railway by means of a bridge. The bridge was not constructed of the width and height prescribed by *The Railway Clauses Consolidation Act*, 1845, sect. 49; and the road beneath the bridge was made of so low a level that it was often flooded, and the passage of foot passengers and the traffic of goods thereby much impeded:—Held, that a mandatory injunction must issue to compel the company to construct a bridge of the prescribed width and height from the surface of the road, such road being of a proper level, so as not to be subject to frequent inundations.¹

Still though corporate bodies or individuals making bridges under special authority (or by Act of Parliament) primarily for their *own benefit*, will be bound to repair them, though the public use them;² they will not be so liable where such body or individual is specially authorized to do works for *the public benefit only*,³ or where it can be shown that the particular liability has been by statute, or otherwise shifted on to the public.⁴

Hence, in *Rex v. Oxfordshire*,⁵ where a county indicted for non-repair of a bridge in a public highway pleaded that such bridge was erected by trustees under an Act of

But not where the special authority is to do works for the benefit of the public.

¹ *A.-G. v. Furness Railway Company*, 38 L. T., N. S. 555; see, too, on this point, *Smith v. Midland Railway Company*, 37 L. T., N. S. 224; *Manser v. North Eastern Counties Railway*, 2 Rail. Cas. 380; *A.-G. v. Mid Kent Railway Company*, L. R., 3 Ch. App. 100.

² *Reg. v. Ely*, 4 New Sess. Cas. 222; *Rex v. Kent*, 13 East, 220;

Rex v. Kerrison, 3 M. & S. 526; *Rex v. Lindsay*, 14 East, 317.

³ *Rex v. Oxfordshire*, 4 B. & C. 194; *Reg. v. Middle Level Commissioners*, 10 L. T., N. S. 375, Q. B.

⁴ *Reg. v. Southampton*, 18 Q. B. 841; 17 Jur. 254; 2 L. J., M. C. 201; *Nicholl v. Allen*, 31 L. J., Q. B. 283.

⁵ 4 B. & C. 194; 6 D. & R. 231.

Parliament, directing them to repair the said road, and empowering them to make and repair bridges, and therefore the said trustees, and not the county, were liable to repair; it was held that the bridge being built for public purposes, in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built; and that the plea was clearly insufficient to exonerate, as it did not aver that the trustees had funds adequate to the repair of the bridge.¹ Bayley, J., remarked, "*Rex v. Inhabitants of Kent*,² and *Rex v. Inhabitants of Lindsay*,³ are distinguishable. In each of those cases power was given to a canal company to destroy fords, and make, repair, and alter bridges, in each a ford had been rendered impassable, and a bridge erected by the company. The bridges so erected were for the private benefit of the company, and it was properly held that the county was never liable to repair."⁴

So, too, where a private individual was empowered under an Act to build a bridge useful for the public, and to take tolls for the same, and when the said bridge should be out of repair was authorized to amend and repair the same, and to substitute a ferry for the bridge during the time of such repair; and where the said private individual was also by a subsequent Act empowered to take increased tolls on account of the increased burden of repair; though it was held by the Court that the builder of the bridge, so long as he remained proprietor and received tolls was liable to an action at suit of a person who suffered special damage from its being impassable, and was bound to repair it, still they refused to grant a mandamus

¹ Semble, that if that fact had been averred and proved, still the county would have been primarily liable, and must have taken their remedy against the trustees. See, too, *Reg v. Kitcheners*, 29 L. T., N. S. 697, *ante*, p. 513.

² 13 East, 220.

³ 14 East, 37.

⁴ In *Reg. v. Ely*, 4 New Sess. Cas. 222; and *Reg. v. Kerrison*, 3 M. & S. 526, defendants cut through a highway, and having rendered it thus impassable, built a bridge to continue the highway.

to compel him to repair the bridge and maintain it in a fit state for passage.¹

By sect. 5 of 43 *Geo. III. c. 59*,² it is enacted that “no bridge hereafter to be built in any county by or at the expense of any individual or private person, body politic

Statutory limitations as to public liability.

43 *Geo. III. c. 59*, s. 5.

¹ *Nicholl v. Allen*, 31 L. J., Q. B. 283; 10 W. R. 761; 1 B. & S. 934; 6 L. T., N. S., Exch. 699.

The liability to repair, which vests in certain special authorities, may be transferred by statute. This point may be illustrated by *Reg. v. Southampton* (18 Q. B. 841; 17 Jur. 254; 2 L. J., M. C. 201). This was a case of indictment for non-repair of three public bridges in the Isle of Wight, in the county of Southampton. The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes or townships in which they were situate, or from rates levied on all the parishes in the island under the following circumstances.—The island having been assessed to the general county rate, and appeals against such assessment having been entered, an arrangement was made, in 1774, by consent under an order of quarter sessions, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges and the house of correction in the island to be raised by a local rate; the island being adjudged and declared not to be liable to pay to the county bridge rate or county house of correction, and the inhabitants agreeing to erect and maintain houses of correction and bridges in the island at their own sole expense. After this arrangement, the practice was for the county quarter sessions, on application of the justices for the Isle of Wight division, to lay a rate in the nature of a county rate on every parish in

the island, for the repair of the island bridges and bridewells. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813, 53 *Geo. III. c. xcii*, appointed commissioners for the repair of the highways in the island, with power to make assessments, and enacted that all bridges previously repaired by any parishes, tithings, divisions or townships in the island should, for the future, be repaired “in such and the same manner, and by such and the same ways and means,” as other bridges, “usually called county bridges,” within the island had been accustomed to be repaired. In 1842, and since, the island was assessed generally with the county, and no separate island rate made. Application for the repair of bridges and bridewells in the island had been, since that time, made to county quarter sessions:—Held, that all bridges, which at the time of the passing of the Act were repairable by the tithings, &c. in which they were situate, were for the future repairable by the county generally, and that the arrangement of 1774 did not affect the legal liability of the county, and was no answer to an indictment against it for non-repair of such bridges.

A foot-bridge formed of three planks, nine or ten feet long, and a handrail, and which carried a public footpath across a small stream, was held not to be repairable as a county bridge, though it had been repaired by the commissioners under the above-mentioned local Act. See, too, *Reg. v. Middle Level Commissioners*, 10 L. T., N. S. 375.

² See *ante*, p. 506, note (1).

“or corporate, shall be deemed a county bridge unless erected in a substantial and commodious manner under the direction or to the satisfaction of the county surveyor.”

Trustees appointed by a local Turnpike Act are individuals or private persons within the meaning of the statute; and a bridge built by them not under the direction or to the satisfaction of the county surveyor, &c., is not a bridge which the inhabitants of the county are liable to repair.¹

The section applies only to bridges newly built, and not to a bridge merely widened or repaired since the passing of the Act.²

Trustees under a Turnpike Act having built a bridge across a stream where a culvert would have been sufficient, but a bridge was better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary.²

But a bridge having been washed away, and after the passing of the Act been rebuilt, wider than before, by the parish, partly with the old materials, and in the same line of passage over the river, but without notice being given to the county surveyor, has been held not to be a new bridge within the meaning of the Act, and that the county were consequently liable to repair it.³

In *Reg. v. Gloucestershire*,⁴ a bridge had been built before the Act over a stream of water never known to be dry, though its depth in winter only averaged two and a half feet; it was part of a sheet of water crossing low land at the place where the bridge crossed it, being confined by embankments to prevent it from overflowing the adjoining meadows; and the judge left it to the jury whether this structure were a bridge over a stream of water, for if so, it was not necessary that it should be for

¹ *Rex v. Derby*, 3 B. & Ad. 147.

³ *Rex v. Devonshire*, 2 M. & N.

² *Rex v. Lancashire*, 2 B. & Ad.

212; 5 B. & Ad. 383.

813.

⁴ 2 Car. & M. 506.

the convenience of the public under sect. 5 of 43 Geo. III. c. 59, but the county were liable to repair it.¹

The inhabitants of a county are not liable to widen a public bridge by force of their obligation to repair it.²

"A similar question to this," said Abbott, C. J., in *Rex v. Devon*,² "came lately before the Court in a case from the county of Lincoln,³ and we then expressed a strong

County not bound to widen bridges by force of obligation to repair them.

¹ A bridge in the Isle of Wight, originally repaired by the tithings, was, after the passing of 53 Geo. III. c. xcii (by which commissioners for the repair of highways were appointed, and bridges previously repaired by the tithings were made repairable by the county) wholly rebuilt by order of the justices of the island division of the county of Southampton. The new bridge was larger than the old, and different in form, and stood higher up the stream. The expense of the building and repairs were defrayed out of the island rate, imposed under a previous arrangement of 1774, under which bridges in the island were repairable by the tithings. The conditions prescribed by 43 Geo. III. c. 59, were not observed in building it:—Held, that the county was liable to repair the new bridge. (See *Reg. v. Southampton*, 18 Q. B. 841; 17 Jur. 254; 2 L. J., M. C. 201.)

By a local Act of 1807, a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway. By another local Act of the same year, a canal company was empowered to support bridges across their navigation, provided no existing liability to repair a bridge not erected or altered by the company should be affected. The company raised the surface of this bridge without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their Act. They did this without reference to

the county surveyor or justices. By 33 & 34 Vict. c. 73, s. 12, where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly:—Held, that by this alteration the bridge had become repairable by the canal company, and that this general provision of the last Act was not limited to those bridges erected by private expense, which alone were repairable by a county under 43 Geo. III. c. 59, s. 5, nor to bridges which had been actually repaired by trustees: *Reg. v. Somerset*, 38 L. T., N. S. 452, Q. B. Div.

² *Rex v. Inhabitants of Devon*, 7 D. & R. 147; 4 B. & C. 670, overruling *Rex v. Cumberland*, 6 T. R. 194, where Lord Kenyon, C. J., laid down that an indictment for not repairing a county bridge may be removed by *certiorari*, notwithstanding stat. 1 Anne, c. 18, s. 5, and those who are bound to repair a bridge are bound to widen it if the exigencies of the public require; Bayley, J., commented on *Reg. v. Stratford*, 2 Ld. Raym. 1169, which had been cited by counsel for the Crown.

³ *Rex v. Inhabitants of Lincoln* (E. T. 5 Geo. IV., May 10th, 1824), where the court suggested there was no case to be found in which it had been held that a county was liable to widen a public bridge, and intimated a strong inclination of opinion that such a liability did not attach as an incident to the obligation of repair. In *Rex v. West Riding of Yorkshire* (2 East, 353, note (a)), where to an indict-

“ opinion that a county was not bound to make a bridge wider than ever it had been before. . . . The question now is, what extent of charge can by law be cast upon the inhabitants of a county. . . . Now, if we should lay down the law to be, that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to say why we should not be at liberty to say that the inhabitants of a parish are liable to widen a public highway.”

Where, however, a particular parish was bound by prescription to repair an old wooden foot bridge (used by carriages only) in times of flood; and about forty years ago, the trustees of the turnpike road built on the same site a much wider bridge of brick, which was constantly used ever since by all carriages passing that way; it was held, that, to an indictment against the county for not repairing this bridge, a plea that the parish had immemorially repaired, and still ought to repair, the *said bridge*, was not supported by evidence of the above facts; and that the burthen of repairing the new bridge must be borne by the county at large.¹

43 Geo. III.
c. 59, s. 2, as
to widening
bridges.

Sect. 2 of 43 *Geo. III. c. 59*, enacts that, “ Where any bridge or bridges, or roads at the end thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the ‘justices’ of the county, at any of their General Quarter Sessions, to order and direct such bridge or bridges, and roads, to be widened, improved, and made commodious for the public.” The section also contains a proviso, that “ No money shall be applied to the amendment or

ment against a riding for not repairing a public carriage bridge, the plea alleged that certain townships had *immemorially* used to repair the said bridge; evidence that the township had enlarged the bridge to a *carriage bridge*, which they had before been bound to repair as a *foot-bridge*, was held not to support the plea. Where

townships have so enlarged a bridge, which they were before bound to repair as a foot-bridge, they shall still be liable *pro ratâ*. Where an individual builds a bridge, which he dedicates to the public, by whom it is used, the county are bound to repair it.

¹ *Rex v. Surrey*, 2 Camp. 455.

“alteration of any such bridge or bridges until present-
 “ment shall have been made of the insufficiency, incon-
 “venience, or want of reparation of such bridge or
 “bridges, in pursuance of some or one of the statutes
 “made and now in force concerning public bridges.”

This section is permissive, and not imperative, and leaves the justices a discretion whether or not to order a bridge to be widened, though it is proved to them to be narrow and incommodious.¹

By the common law declared and defined by the statute 22 *Hen. VIII. c. 5*, and the subsequent Bridge Acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to the repair of the highway at the ends of the bridge, to the extent of 300 feet; and, if indicted for the non-repair thereof, they cannot exonerate themselves, except by pleading specially that some other is bound by prescription or tenure to repair the same.²

County liable to repair the approaches to bridges to extent of 300 feet.

So, too, where there is a prescriptive liability to repair a bridge, it is an intendment of law, in absence of any evidence to the contrary, that the liability extends to 300 feet of the approaches of the bridge.³

A new and substantive bridge of public utility, built within the limit of one county, and adopted by the public, is repairable by the inhabitants of that county, although it be built within 300 feet of an old bridge repairable by the inhabitants of another county, who were bound in course under the statute 22 *Hen. VIII. c. 5*, to maintain such 300 feet of road, though lying in the other county.⁴ In such a case, each is a substantive bridge in a different county, and the bridge cannot be considered as an appendage to the other. The statute of Henry VIII. attaches

¹ *Re Newport Bridge*, 2 El. & El. 377; 6 Jur., N. S. 97; 29 L. J., M. C. 52; 1 L. T., N. S. 1131; cf. *Reg. v. Adderbury East*, 1 D. & M. 324; 5 Q. B. 187; 7 Jur. 1035; 13 L. J., M. C. 91.

² *West Riding of Yorkshire v.*

Regem (in error for King's Bench), 2 Dow, 1; 5 Taunt. 284; 7 East, 588; 3 Smith, 437.

³ *Reg. v. Lincoln*, 3 N. & P. 273; 8 A. & E. 65; 1 W., W. & H. 260; 2 Jur. 615, 807.

⁴ *Rex v. Devon*, 14 East, 477.

equally on the inhabitants of each county in respect to its own bridge.¹

Where a railway is carried over a highway by means of a bridge, no liability to keep in repair the immediate approaches on each side of the bridge is cast upon the county by any of the provisions in the *Railway Clauses Consolidation Act*, 1845,² even though the company have lowered the level of the old highway in making those approaches.³

Where the parts of bridges are in different counties liability divided between the two.

It may sometimes happen that the two parts of a bridge may be situate in different counties,⁴ in which case the liability to repair would be naturally divided between the two counties.

The statute 5 & 6 *Will. IV. c. 76*, enlarging the boundaries of certain cities and boroughs in England and Wales, for the purposes therein mentioned, does not relieve a county from the repair of bridges situate within the new limits of boroughs, but which, previous to the Act, were without the old limits, and repairable by the county at large.⁵

Where a bridge over the Wye was situated in a certain parish, part of which was on the right and part on the left bank of the river; and where, owing to the passing of 7 & 8 *Vict. c. 61*, doubts arose as to the liability of two counties on opposite sides of the river to repair the said bridge:—Held, that, in the absence of any words in the Act determining the boundary between the two counties,

¹ *Ib.*, per Lord Ellenborough.

² 8 *Vict. c. 20*, ss 46—65.

³ *London and North Western Railway v. Skerton*, 33 *L. J.*, *M. C.* 158; 5 *B. & S.* 559. Cf. *Waterford and Limerick Rail. Co. v. Kearney*, 12 *Ir. Com. Law Rep.* 224, and *Fosberry v. The Waterford and Limerick Rail. Co.*, 13 *Ir. Com. Law Rep.* 494.

⁴ *Reg. v. New Sarum*, 2 *New Sess. Cas.* 133; 7 *Q. B.* 241; 10 *Jur.* 176; 15 *L. J.*, *M. C.* 15; *Reg. v. Brecon*, 4 *New Sess. Cas.* 272; 15 *Q. B.* 813; 19 *L. J.*, *M.*

C. 203. Cf. *Rex v. Devon*, 14 *East*, 477; *ante*, p. 504.

⁵ *Reg. v. New Sarum*, 2 *New Sess. Cas.* 133. Referring to this case, Patteson, J., in *Reg. v. Brecon*, 4 *New Sess. Cas.* 272, said: "In that case, a parish containing a bridge was added to an old borough, which had never been liable to maintain any bridges, and it would be strange to say, that, in such a case, a new liability was cast where none had existed before."

the ordinary rule of *medium filum aquæ* must apply, and that the middle of the river continuously was such boundary line.¹

“With respect to the liability at common law for the repair of bridges *ratione tenuræ*,” said Lord Denman, C. J., in *Baker v. Greenhill*,² “the result of the authorities seems to be to throw the charge ultimately upon the owner, though primarily, as far as the public are concerned, the occupier may be the person chargeable by indictment in case of non-repair;”³ (*The Queen v. Bucknell*, 7 Mod. 55, 98; Hawk. P. C. b. 1, c. 77, s. 3, vol. 2, p. 258, 7th ed., and the cases there cited); and it would seem from those authorities, that, if the owner of land charged with the repair of a bridge *ratione tenuræ* suffer it to be out of repair, and the occupier of the land be indicted and fined, he would be entitled to look for re-imbursement to the owner who ought to have it repaired, and who holds the land by the service of repairing the bridge.”⁴

Liability to repair *ratione tenuræ*.

The owner of land is ultimately liable, though primarily the occupier may be.

¹ *Reg. v. Breeon*, 4 New Sess. Cas. 272; 15 Q. B. 813; 19 L. J., M. C. 203.

² 3 Q. B. 148; 2 G. & D. 435.

³ *Rex v. Sutton*, 5 N. & M. 353; and also *Rex v. Kerrison*, 1 M. & S. 435; *Rex v. Oxfordshire*, 16 East, 223; *Rex v. Hayman*, M. & M. 401; *Rex v. Middlesex*, 3 B. & Ad. 261.

⁴ In this case,—*Baker v. Greenhill*, 3 Q. B. 148,—a landowner, liable, amongst others, to repair a bridge *ratione tenuræ*, demised land; and the lessee covenanted to pay the rent clear of land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, taxed or imposed, or to be taxed or imposed, upon the premises, or upon the lessor, in respect thereof, the landlord's property tax only excepted. A statute, reciting the liability *ratione tenuræ*, and that part of the bridge was out of repair, enacted that landowners

liable as above, should repair, and keep in repair, the said parts during the continuance of the Act. On their default, road trustees appointed under the Act were to do the repairs, and recover against owners; a power of distress under a justice's warrant being given to enforce payment; while, for raising the sums required, a power was also given to the landowners, to call meetings, and to meet and make rates according to the value of the chargeable land; such rates to be levied by distress, if necessary. A subsequent Act, reciting the above-mentioned liability, made further provisions as to the holding of such meetings, and levying rates for the said repairs:—Held, that the original liability for contribution to repairs did not, by these enactments, become a parliamentary tax or deduction within the lessee's covenant; and, therefore (the Court finding no

Such appears to be the general rule respecting liability *ratione tenuræ*. Some illustrations of, and exceptions to it, require, however, to be noted.

Liability of
an infant
seised of lands
in socage.

An infant seised of lands in the actual possession of the guardian in socage,¹ is not indictable for the non-repair of a bridge *ratione tenuræ*, and the guardian in socage, if in possession of the lands charged with the repairs, is indictable.¹

Of proprietor
of a naviga-
tion.

An indictment, charging an individual with the repair of a bridge, *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought it will be reversed.²

A count, it appears, charging such an individual, by reason of his being owner of a navigation, under a private Act of Parliament, must set forth the Act.

Covenant to
build and
repair a
bridge, how
far binding
when damage
is done by an
extraordinary
flood.

On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken by an extraordinary flood.³

"It has been usual," remarked Lord Kenyon, C. J.,⁴ "for many years past, to insert covenants of this kind in "contracts for building bridges. . . . The principle "stated by the counsel for the plaintiffs" is the true one ;

clause in the above statutes which extended the ultimate liability to lessees and occupiers, as well as owners), that the lessee, having been compelled, in the lessor's default, to pay a rate made as above, and charged upon him as lessee and occupier, might (in the manner pointed out by one of the statutes) recover the amount from the lessor.

¹ Guardian in socage is the next friend in blood to whom the inheritance cannot descend; *Rex v. Sutton*, 5 N. & M. note (a), p. 553; Lit. 123; Park. 65; Dyer, 359 b; 2 Roll. Abr. 40, 1, 10, citing 27 Edw. III. 79 b of the 1st ed. of the Year Books, being 27 Edw. III. fo. 3, pl. 26, of the 2nd ed.;

14 Vin. 78, pl. 2.

² *Rex v. Sutton*, 5 N. & M. 353; 3 A. & E. 597; 1 H. & W. 428. So any occupier of the lands charged. Quere, whether the guardian in socage or other owner of the lands charged *not in possession* would also be indictable.

³ *Rex v. Kerrison*, 1 M. & S. 435; cf. *Rex v. Penegoes and Machynleth*, 3 D. & R. 388.

⁴ *Brecknock Navigation v. Pritchard*, 7 T. R. 750.

⁵ Per counsel for the plaintiffs:—"The distinction taken in the "books is this: When the law "creates a duty, and the party is "disabled to perform it without "any default in him, and he has "no remedy over, the law will

"if the defendants had chosen to except any loss of any kind, it should have been introduced into the contract by way of exception. It is sufficient to say here that the contract of the defendants extends to this case; that they have not fulfilled it; and, therefore, that they are answerable."

If A. grants liberty, licence, power, and authority to B. and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it, and not to demand toll, the property in the materials of the bridge, when built and dedicated to the public, still continues in B., subject to the right of passage by the public; and when severed and taken away by a wrongdoer, he may maintain trespass for the asportation.¹ They [the materials] were dedicated by him to the public for given purposes; but a *scintilla* of property still remained in him."²

If bridge be built by an individual and dedicated to the public, ownership of fabric remains in builder.

An indictment for not repairing a bridge, described as situate within the parishes of Penegoes and Machynleth, and averring that the inhabitants of Penegoes, and the inhabitants of the township of Machynleth, were liable to repair, by reason of the tenure of certain lands, without going on to state what part of the bridge was situate within the township of Machynleth, and that the inhabitants thereof were liable to repair; is erroneous.³

Form of indictment for non-repair *ratione tenuræ*

To an indictment against a county for not repairing a bridge, it was pleaded, that J. S. is liable *ratione tenuræ*:—Held, that this plea was not supported by evidence that

"excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if a lessee covenants to repair a house, though it should be burned by lightning, or thrown down by enemies, yet he ought to repair. (All. 27; Dy. 33 a;

"Com. Rep. 627; and *Bullock v. Domville*, 6 T. R. 651.) And here a loss by a flood must have been the very loss in contemplation of the parties." See *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, ante, Chap. III. p. 142.

¹ *Harrison v. Parker*, 6 East, 154; 2 Smith, 262.

² *Ib.* per Lord Ellenborough.

³ *Rex v. Penegoes and Machynleth*, 3 D. & R. 388; 2 B. & C. 166.

the estate of J. S. was part of a larger estate, which part J. S. purchased of the former owner, who retained the rest in his own hands, and, as well before the purchase as since, had repaired the bridge.¹

If a manor be held by the service of tenure of repairing a common bridge or highway, and the manor be divided, the tenant of any parcel, either of the demesnes or services, is liable to the whole charge, but may recover contribution.¹ An agreement by the lord to discharge the purchasers, would only bind him and those who claim under him, and will not affect the remedy of the public. Though the manor comes into the hands of the Crown, yet the duty continues as against every person claiming under the Crown.²

Liability to repair must be immemorial.

An indictment for non-repair of a road or bridge on a liability *ratione tenuræ*, cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory.³ On such an indictment parishioners are admissible witnesses for the prosecution.⁴

In *Rex v. Middlesex*,⁵ it was pleaded to an indictment against the inhabitants of the county for non-repair of

¹ *Rex v. Oxfordshire*, 16 East, 223. But where in this case the county was found guilty, the Court gave leave to stay judgment upon payment of costs until another indictment was preferred, in order to try the liability, Lord Ellenborough, C. J., saying, "But I should be sorry to conclude the county from bringing forward their case, as it is clear they have never repaired."

² *Reg. v. Buccleuch, Duchess of*, 1 Salk. 358.

³ *Rex v. Hayman*, M. & M. 401. There the indictment alleged that defendant and those whose estate he had of and in a certain mill, from time whereof the memory of man runneth not to the contrary, had repaired, and of right ought to repair, &c. Certain documents of the reign of Hen. VIII. were put in for the defendants, which showed conclusively that the mill,

by reason of the tenure of which the obligation was alleged, did not exist before that time; and it was contended that this disproved the liability.

Per Tindal, C. J., it is essential to prove the liability from time out of memory. This is disproved, and the defendant must be acquitted. See, too, note at p. 403 of report, and *Rex v. Stoughton*, 2 Saund. 158.

⁴ See 54 Geo. III. c. 170, s. 9.

⁵ 3 B. & Ad. 201; cf. *Rex v. West Riding of Yorkshire*, 2 East, 359; per Littledale, J., "I think the footbridge which was erected in comparatively modern times cannot be considered as having become parcel of the old carriage bridge repairable by the owners of the abbey lands, but was a distinct structure, and, therefore, that the verdict must stand for the Crown."

a foot bridge, that it was parcel of a carriage bridge which A. B. was bound to repair *ratione tenuræ*. The liability to repair the carriage bridge, which had been built in 1119, and the repair charged on certain abbey lands of which A. B. was the present proprietor, was admitted; but it was denied that the foot bridge was part of the same, and it was proved that the latter had been constructed in 1763 by trustees of a turnpike road with the consent of a certain number of the proprietors of the abbey lands:—Held, that this (being the foot bridge mentioned in the indictment) was not parcel of the carriage bridge which A. B. was bound by tenure to repair, and consequently that the county was bound to repair the foot bridge.—Per Lord Tenterden, “Now it is well established that the inhabitants of a county, though bound to repair a bridge are not bound to widen.”

On an indictment for the non-repair of a bridge *ratione tenuræ*:—Held, that a record of 18 *Edw. III.*, setting out a presentment of the Bishop of Lincoln for non-repair of the bridge and his acquittal by the jury, which was shortly after followed by a grant of *pontage* from the Crown, on the ground that it had been found by inquest that no one was liable to repair the bridge, is admissible in evidence to negative an immemorial liability *ratione tenuræ*.¹

What is evidence to negative an immemorial liability *ratione tenuræ*.

Where, in an answer to an indictment, it is pleaded that one A. is liable to repair *ratione tenuræ*, evidence of reputation is admissible in proof of such liability.²

Evidence of reputation admissible in proof of liability.

The principle as to prescriptive liability is discussed by Lord Ellenborough in *Rex v. Ecclesfield*.³ Referring to the Statute of Bridges and Magna Charta, he says:—

Liability to repair by prescription.

“From both which statutes it appears that towns or

¹ *Reg. v. Sutton*, 3 N. & P. 569. The jury, after finding a verdict of acquittal, also found that the bridge had been recently built, and that no one was liable to repair it. Semble, that such finding by a jury in ancient times is admissible as reputation on questions as to

the liability to repair *ratione tenuræ*.

² *Reg. v. Bedfordshire*, 4 El. & Bl. 535; 1 Jur., N. S. 208; 24 L. J., Q. B. 81.

³ 1 B. & A. 348; *Rex v. Hendon*, 4 B. & Ad. 628, note (c).

⁴ Page 359.

“districts smaller than a county had been accustomed in
 “some cases to make bridges; and so, in fact, they con-
 “tinue to do until this day. And upon the whole it
 “seems manifest that the extent of the territory chargeable
 “in the case is to be ascertained by usage and custom,
 “and that in default only of an usage and custom to
 “charge a smaller territory, the charge shall be upon
 “the larger, *i.e.* upon the county;” and he then goes
 on to draw an analogy between the liability of a parish to
 repair a bridge and that of a township to repair a road by
 usage.¹

As stated above,² the repair of bridges by tenure or
 prescription is a remnant of the *trinoda necessitas*, the com-
 mon law liability of the county not being established fully
 till the passing of the Statute of Bridges in 22 *Hen. VIII.*
 In such few cases, therefore, as the immemorial custom
 of repairing a bridge can be proved, it can be pleaded in
 defence to an indictment.³

A parish may
 be indictable.

Hence, a parish may be indicted for non-repair of a
 bridge without stating any other ground of liability than
 immemorial usage.⁴

So, too, a
 hundred.

So, too, a hundred may be charged by prescription with
 the reparation of a bridge; and this, although it appears
 that by a statute within time of legal memory one of the
 townships, parcel of the hundred, was then annexed to it.⁵
 In such a case the proper way would be to allege that the
 corporation had immemorially repaired; and then, how-
 ever constituted the corporate body may have been at
 different periods, the allegation would be sustained.⁶

¹ Cf. Blackstone's Com. vol. i.
 p. 357; 9 *Hen. III.* c. 15 (Ruff.);
 22 *Hen. VIII.* c. 75; see *ante*,
 p. 503.

² Page 29.

³ *Rex v. Stratford-on-Avon*, 14
East, 348; *Rex v. Oswestry*, 6 *M.*
 & *S.* 361; *Rex v. Hendon*, 4 *B.*
 & *Ad.* 628; and cf. *Reg. v. Surrey*, 2
C. & M. 455; *Reg. v. Adderbury*,
 1 *D. & M.* 324.

⁴ *Rex v. Hendon*, 4 *B. & Ad.*
 628.

⁵ *Rex v. Oswestry*, 6 *M. & S.*
 361.

⁶ Holroyd, J., in *Rex v. Oswes-*
try, 6 *M. & S.* 361. See note (a)
 p. 361 of the report, for form of
 an indictment against the corpo-
 ration of Kingston for the non-
 repair of Kingston Bridge.

A charter of Edward VI., granted upon the recited prayer of the inhabitants of the borough of Stratford-upon-Avon, recited that a guild in an ancient borough was founded and endowed with lands, out of the rents and revenues and profits of which a *school* and an *almshouse* were maintained and a *bridge repaired*. That on the dissolution of the guild and the passing of the lands to the Crown, the inhabitants of the borough, reciting that the said borough had from time *immemorial* enjoyed franchises, liberties, &c., &c., &c., which had been enjoyed by reason of the said guild, and that by the dissolution thereof the borough and its government would fall into a worse state without speedy remedy, &c., &c., prayed to be deemed worthy to be made a body corporate, &c., &c. That they were in consequence granted to be a corporation "*with the same bounds and limits as the borough and the jurisdictions thereof from time immemorial had extended to,*" and that the king, "willing that the almshouse and the school should be kept up and maintained as heretofore (*but without mentioning the bridge*), and that the great charges to the borough and its inhabitants from time to time incident might be the better sustained and supported," granted to the corporation the lands of the late guild. By parol testimony it was proved that as far back as living memory went, the corporation had always repaired the bridge:—Held, taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, *first*, that this was a *corporation by prescription*, though words of creation only were used in the incorporating part of the charter of Edward VI.; and *secondly*, that the burden of repairing the bridge was upon such prescriptive corporation during the existence of the guild before that charter; though the guild out of their revenues had in fact repaired the bridge, which was only in ease of the corporation and not *ratione tenuræ*; and that the corporation were still bound by prescription, and not merely by tenure; and, therefore, that a verdict against them upon

Or a prescriptive corporation.

an indictment for the non-repair of the bridge charging them as *immemorially* bound to repair was sustainable.¹

Where there is a prescriptive liability to repair a bridge, it is an intendment of law, in the absence of any evidence to the contrary, that the liability extends to 300 feet of the approaches at each end of the bridge.²

¹ *Rex v. Stratford-on-Avon*, 14 East, 348; cf. *Rex v. Oswestry*, 6 M. & S. 361, note (a).

² *Reg. v. Lincoln*, 3 N. & P. 273; 8 A. & E. 65; 1 W. W. & H. 260;

2 Jur. 615, 807. See remarks of Lord Denman, C. J., therein on the *Abbot of Combe's case*, 43 Assis. pl. 37; and on *Rex v. West Riding of Yorkshire*, 7 East, 598.

CHAPTER IX.

OF TOLLS AND RATES.

OF the incidents mentioned in the previous chapter, two—viz. *tolls* and *rates*—remain to be noticed. Of these the first named is naturally connected with the right of navigation, and has been already incidentally alluded to.¹ The second, that of rateability, arises from the improvement of land in value by water which either arises on it in the form of springs, or passes over it in the form of a natural watercourse, or is conveyed over it artificially,—as by open channels or pipes.

Tolls and rates how incident to rights of water.

Toll, *tolnetum*, or *telagium* are all of them terms of the same import, and signify, in a general sense, a sum of money paid by the buyer for exporting or importing goods and merchandise.² Toll has also been defined as “a tribute or custom paid for passage;”³ while in the *Termes de la Ley*⁴ it is described as “a payment used in “cities, towns, markets, or fairs for goods and cattle “brought thither to be bought or sold, and is always paid “by the buyer, and not by the seller, unless there is some “custom otherwise.”⁵

Tolls.
Definition.

Such definitions are, however, as is stated in the authority above quoted, too general for practical purposes; and the nature of toll will be better understood if we briefly examine the distinction between *toll thorough* and *toll*

¹ See Chap. I., Chap. V., and Chap. VII., and as to Ferries Chap. VIII.

² Gunning on Tolls, p. 1; 2 Inst. 58.

³ Wharton's Law Lex. (Cowel), p. 937; Brown's New Law Dict. 362.

⁴ See, too, Gunning, p. 1.

⁵ Gunning, p. 1.

Of tolls generally.

traverse, the two chief species of toll. This will be conveniently done here, since as the law relating to the taking of tolls for passage on a highway or through a street applies equally to that along the sea or navigable waters, it will be necessary to consider some points relating to the general law of tolls before treating of those incident to various rights of water.¹

Toll thorough, definition of.

Toll thorough is a sum paid for passage through a highway,² or a toll taken from men for passing through a vill in a street,³ both of which definitions apply equally to a toll taken for passage over the sea or on a navigable river, or over a public ferry or bridge.⁴ It cannot be claimed unless the party demanding it can show that the public, whose common law right to a free passage along the highway he seeks to abridge, receive from him a good consideration for the imposition.⁵

Toll traverse, definition of.

Toll traverse, on the other hand, may be prescribed for by a corporation or an individual without alleging any consideration, and the prescription will be good.⁶ It derives its name from the fact that it is a toll paid for traversing the land of another,⁷ and has been defined as "a sum demanded for passing over the private soil of "another,"⁸ and also as "a duty which a man pays for "passing over the soil of another in a way not a high "street,"⁹ though it may, under certain circumstances, be "payable for passing over the common public highway."¹⁰

The distinction between

The distinction between the two species of toll was

¹ Gunning, p. 214; *Haspurt v. Wills*, 4 Vent. 71; 1 Sid. 454; 1 Mod. 47; *Warren v. Prideaux*, 1 Mod. 104; *Mayor of Nottingham v. Lambert*, Wills, 111; *Truman v. Walgham*, 2 Wilson, 296; *Hill v. Smith* (in error), 4 Taunt, 520; *Rickards v. Bennett*, 1 B. & C. 223, &c., &c.

² Gunning, p. 2; Com. Dig. tit. Toll (C).

³ Ib. p. 2; Vin. Abr. tit. Toll (A).

⁴ Ib.; *Haspurt v. Wills*, 1 Vent. 71; 1 Sid. 454; 1 Mod. 47; *War-*

ren v. Prideaux, 1 Mod. 104; 2 Lev. 96; *Mayor of Nottingham v. Lambert*, Wills, 111.

⁵ Gunning, p. 3; *Smith v. Shepherd*, Moore, 574; Cro. Eliz. 710.

⁶ Gunning, p. 27; *Truman v. Walgham*, 2 Wils. 296.

⁷ Gunning, p. 26; *Crispe v. Belwood*, 3 Lev. 424.

⁸ Ib.; Com. Dig. tit. Toll (D).

⁹ Ib.; Vin. Abr. tit. Toll (A); 22 Ass. 58.

¹⁰ Ib.; *Pelham v. Pickersgill*, 1 T. R. 660; *Brett v. Beales*, 10 B. & C. 508.

exhaustively discussed in the judgment of Willes, C. J., in *Mayor of Nottingham v. Lambert*,¹ which was a prescription to take a toll for passing on an ancient navigable river.

the two
species of toll.
Mayor of Not-
tingham v.
Lambert.

“ . . . A difference has always been taken between *toll thorough* and *toll traverse*. It has been holden several times and by the best authorities that toll thorough cannot be supported without a consideration; but toll traverse may, because it in itself implies a consideration. In the *Book of Assize*, 22 *Edw. III. c. 58*, it is expressly laid down as a rule that toll thorough is against common law and common right, and cannot be supported by usage. It is so likewise holden in *Keilw.* 148, 149, that such toll is not allowable without some particular consideration. It is said in 1 *Leon.* 232, that the king cannot grant toll thorough for passing through a highway, for that is an oppression to the people, for that every highway shall be common to everyone. In 1 *Vent.* 71, in the case of *The City of Norwich*,² such custom was holden to be illegal and unreasonable, unless for such vessels as unloaded at the quay there. In several books it is called *malum tolnetum*, or an outrageous toll, and an oppression on all the subjects of England, which sort of tolls are condemned in *Magna Charta* (9 *Hen. III. c. 30*), and by the *Statute of West-*

¹ Willes, 111 *et seq.*; see also *Woolrych*, 382, and *Gunning*, 22.

² *Haspurt v. Wills* (in error), 1 *Ventr.* 71; 1 *Mod.* 47, *S. C.* (reported by name of *Heshod v. Wills*), 1 *Sid.* 454. See, too, *Gunning*, p. 21, *Woolrych*, p. 302. This was a special action on the case on a custom of wharfage in Norwich. Plaintiff stated in his declaration that he had and maintained a common wharf and crane thereto attached for unloading such goods as were brought up the river in vessels to the city, and custom alleged was that every vessel passing through the river by the

wharf paid a certain duty for which the action was brought. The Court held the custom bad and void as to all vessels which did not unload “at the wharf or any other place within the city,” there being no benefit redounding to them from the maintenance of the wharf, they only passing by bound for another place, and they could, therefore, have no imposition on them, but if they had received their freight at the wharf, it might extend to them. The reports of this case in *Vent.* and *Mod.* differ; on which point see *Gunning*, p. 22, and *Woolrych*, p. 301.

“ *minster* 1 (3 *Edw. I. c.* 31), where it is said that if any-
 “ one take outrageous tolls contrary to the common law of
 “ the realm, if it be in a vill of the king’s, the king shall
 “ take away the franchise. And this distinction is sup-
 “ ported by reason as well as authority; for how can a
 “ duty be imposed on all the subjects of England only for
 “ enjoying that privilege which is their ancient birthright,
 “ and which every subject had a right to before? If,
 “ indeed, they receive any particular benefit, as going
 “ over a bridge, coming into a quay, wharf, port, or the
 “ like, this, indeed, may alter the case; but then this
 “ must be particularly shown.¹ Some cases have been
 “ cited to the contrary, but when looked into they either
 “ stand on some particular reason which plainly distin-
 “ guishes them from the common case, or it is only said
 “ *obiter* that such tolls may be supported by prescription
 “ without any consideration; but the reasons given for it
 “ are such as make such dicta of no weight or authority.²
 “ It is said, indeed, in some books, and particularly in
 “ the case of *James v. Johnson*,³ that if the prescription be
 “ found (as it is in the present case), it must have a reason-
 “ able commencement; but this is laid down generally
 “ without consideration, and without distinguishing the
 “ nature of the cases. For though this may be true
 “ sometimes in the nature of a private right, it is plainly
 “ otherwise in the case of a right to which all the subjects
 “ of England are entitled. For if a reasonable com-
 “ mencement be presumed, it must be that it began by
 “ agreement, and that such an agreement, being so long

¹ *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. Mayor and corporation of Yarmouth prescribed to have a toll called measurage from every merchant exporting corn or grain from the port of Great Yarmouth to ports beyond the seas, but the consideration was not set forth. There was a demurrer, and it was said that there could not be any thorough toll without a special

consideration; but the Court were of a different opinion. See, too, Gunning, p. 23, and Woolrych, p. 301.

² His lordship then referred to 21 Hen. VII. fol. 16; *Smith v. Shepheard*, Cro. Eliz. 711; *Moor*, 576; *James v. Johnson*, 1 Mod. 232, and other authorities.

³ 1 Mod. 233.

“ago, cannot be proved well, may be well enough in the
 “case of a private right. But who could agree for all
 “the subjects of England? They cannot consent to part
 “with their rights any otherwise than by Act of Parlia-
 “ment, in which the consent of everyone is implied.
 “This distinction is obvious, and founded on good sense.
 “. . . . In several of the cases cited there is a particular
 “benefit to the subject, as coming into a port, or landing
 “on the plaintiff’s manor or quay, which distinguishes it
 “from toll thorough. So are the cases *Haspurt v. Wills*,¹
 “*Mayor of London v. Hunt*,² *Crispe v. Belwood*,³ and several
 “other cases which were cited.⁴ And there is a further
 “reason to be given for the determination in 3 Lev. 37,—
 “that the duty was claimed by the city of London, whose
 “customs and franchises are all confirmed by Act of Par-
 “liament.⁵ In the case of *Wilkes v. Kirby*,⁶ the duty was

¹ 1 Mod. 478.

² 3 Lev. 37.

³ 3 Lev. 424; and cf. *Colton v. Smith*, Cowp. 47; Willes, 117, note (a).

⁴ In *The Mayor of London v. Hunt*, it was objected in assumpsit for weighage of goods brought into the Port of London that there was no consideration for the duty. But as the defendant had the liberty of bringing his goods into port, which is a place of safety, it was resolved that the consideration was implied (3 Lev. 37; see, too, *Gunning*, pp. 29, 33, 115; and *Woolrych*, p. 300). In *Crispe v. Belwood*, 3 Lev. 424 (see also *Gunning*, p. 21; and *Woolrych*, p. 300), on the other hand, the Court supported the claim of a lord of the manor, to toll for all goods landed *within the manor*, though not upon the wharf, which alone, as appeared by the plea, the lord repaired; remarking that, originally the lord was owner of all the soil in the manor, and that, therefore, the prescription was good in respect of the easement in landing goods on his soil. The case was distinguished from that of *Warren*

v. Prideaux, 1 Mod. 104, which see *post*.

⁵ *Mayor of London v. Hunt*, *sup*.

⁶ 2 Lutw. 1519. This case (also reported 1 Lutw. 490, and see *Gunning*, pp. 19, 20; and *Woolrych*, p. 300), was an action of trespass for taking plaintiff’s goods at the port of King’s Lynn in Norfolk. Defendant justified under a plea of prescription for owners of the port of King’s Lynn, to take a certain toll for merchandise loaded there, to be exported from thence by foreigners not free of the borough, and plea alleged that “this was towards the necessary reparation of the port,” and a right to distrain on refusal to pay. On demurrer, it was objected that this was not a good plea, because it was stated only that the toll was towards the reparation of the port, and not that the owners of the port in fact repaired, or were bound to repair, the port, and, in consideration of such obligation, took the toll. It was also objected that the consideration itself was insufficient in law, even if it was well pleaded. The case was

“ expressly laid to be paid *erga reparationem portus*. It
 “ is best, therefore, to adhere to the old rule, which is
 “ founded upon the best reason, that toll thorough cannot
 “ be maintained without a particular consideration shown.”

The principles here stated have been confirmed by subsequent decisions; and there seems no ground for believing, as stated by counsel in *James v. Johnson*,¹ that the terms toll traverse and toll thorough are used promiscuously. Though Woolrych seems not to dissent from that doctrine,² it appears to be satisfactorily refuted by the remarks of Willes, C. J., in the judgment just noticed, who states the distinction between the two “ to be obvious, and “ founded on good sense ; ” and according to Gunning on *Tolls*,³ the case of *James v. Johnson* is one of questionable authority.⁴

These authorities seem sufficient to support the distinction above given between toll thorough and toll traverse, the former of which, being contrary to common right,⁵ is treated with great jealousy by the courts,⁶ which will require the person seeking to charge the public with it to

not decided ; but the Court (according to Gunning) strongly inclined for the defendant, because he might have been indicted for not repairing the port.

¹ 1 Mod. 232, per Serjeant Maynard.

² Woolrych, p. 303 ; and see *Steinson v. Heath*, 3 Lev. 400.

³ Gunning, p. 26.

⁴ In *Truman v. Walgham* (2 Wilson, 296), the Court said : “ This is a prescription for toll for “ passing through the King’s “ highway ; . . . which cannot “ be taken unless a good consideration be alleged : the reason is, “ because it is to deprive the “ subject of his common right and “ inheritance, to pass through the “ King’s highway, which right of “ passage was before all prescriptions [*Smith v. Stephen*, Moore, “ 574]. Toll traverse, or for “ going through a man’s private “ land, may be prescribed for,

“ without any consideration, and “ payment time out of mind is “ sufficient, and will support the “ prescription.” Cf., too, the remarks of Lord Tenterden, C. J., in *Brett v. Beales*, 10 B. & C. 508 ; 1 M. & M. 416 ; *Hill v. Smith*, 4 Taunt. 520 ; Popham, J., in *Smith v. Shepherd*, Cro. Eliz. 710 ; Moore, 574. See also *Pelham v. Pickersgill*, 1 T. R. 660, remarks of Buller, J. ; *Brecon Markets Co. v. Neath and Brecon Rail. Co.*, 42 L. J., C. P. 63, Exch. ; *Rickards v. Bennett*, 1 B. & C. 223 ; *Laurence v. Hitch*, 9 B. & S. 467 ; *Middleton v. Lambert*, 1 A. & E. 401 ; *Reg. v. Salisbury (Marquis)*, 3 N. & P. 476, Q. B.

⁵ Gunning, pp. 3, 25 ; Thorpe, J., 22 Ass. 58 ; 2 Roll. Abr. tit. Toll (B), pl. 1 ; *Mayor of Nottingham v. Lambert*, Willes, 111 ; Woolrych, p. 299.

⁶ *Truman v. Walgham*, 2 Wils. 96.

prove to their satisfaction a good consideration for it, and such consideration will not be implied even from a prescriptive taking of toll.¹ It is, however, frequently a right incident to ports, as will be seen later on. Toll traverse, which can only be demanded when it has been used to be taken time out of mind,² and the reservation of which must be contemporaneous with the dedication of the way to the public,³ is sometimes due for the private ferry, bridge, &c., of another.⁴

The right to take tolls exists only by Act of Parliament, by express grant from the crown, or by immemorial usage, which pre-supposes such a grant, and from which, if uncontradicted, a grant must be presumed. In no case can a claim for toll be supported unless some consideration can be shown on which to found the claim, an express grant from the crown being void unless founded on sufficient consideration, the creation of a toll being only a mode of paying for a public service.⁵

Previous to the Prescription Act,⁶ "it was necessary to show that the right prescribed for existed in the time of Richard I., which was done either by positive proof of its existence at that remote period, or by the evidence of modern usage from which its existence at that time could be inferred."⁷

Prescription
and immemo-
riality.

Though, however, it is now regulated by that statute, the question of immemoriality may still arise.

"'Prescription,' 'from time whereof the memory of man runneth not to the contrary,' and 'time out of mind,' are all one in law,⁸ and this, says Lord Coke,⁹ is to be understood not only of the memory of anyone

¹ *Mayor of Nottingham v. Lambert*, Willes, 111.

² Fitz. tit. Toll, pl. 3.

³ *Felham v. Pickersgill*, 1 T. R. 660.

⁴ 1 Sid. 454.

⁵ *Jenkins v. Hervey*, 1 C. M. & R. 877; *Kingston-on-Hull Docks v. Lamarche*, 8 B. & C. 42; *Falmouth v. George*, 5 Bing. 206; *Gann v.*

Free Fishers of Whitstable, 11 H. L. 192; *Mayor of Nottingham v. Lambert*, Willes, 111; *Mayor of Exeter v. Warren*, 5 Q. B. 773; see *ante*, Chap. I. p. 46, and *post*, p. 569.

⁶ 2 & 3 Will. IV. c. 71.

⁷ Gunning, pp. 27, 28.

⁸ Com. Dig. tit. Prescript (E).

⁹ Co. Litt. 115 a.

“living, but also of proof of any record, writing or other-
“wise to the contrary.”¹

Where rights are claimed by prescription, the jury ought to be directed that from modern usage they are warranted in presuming that the right claimed is immemorial, unless they are satisfied of the contrary by other evidence.²

No objection can be made on the ground of rankness³ to a toll, the right to levy which depends upon a corresponding obligation to do something beneficial to the payers of the toll.

The long enjoyment of tolls lays a foundation for a good consideration in respect of them.⁴

“Where a record is produced to prove a custom, and
“there is no direct issue on the custom, the constant
“practice is,” said Lord Abinger, C.B.,⁵ “to give some
“evidence to show that the custom was really in question,
“otherwise a verdict in *indebitatus assumpsit* would prove
“nothing.”

“It is well known,” said Best, C. J., “that many tolls
“are good under a custom of which a good grant could
“not be made at the present time. A custom which is
“proved to have existed immemorially will be good if it
“be of such a nature that it is possible it can have had
“a good beginning. Although it be such as to confer
“what the king cannot now grant, yet if it be not con-
“trary to reason it may be supported; for it might have
“had its commencement from an Act of the legislature.
“Custom is a local law which supersedes the general law,
“and if the law gives us the maxim, ‘*Consuetudo ex certâ
“causâ rationabili privat communem legem*,’ the custom on
“which the plaintiff rests his claim appears to us to be
“reasonable and convenient, even to those who resist its

¹ Gunning, p. 27.

² *Jenkins v. Harvey*, 1 Gale, Exch.

23.

³ *Ib.*; 1 Gale, 454 (Exch.); 5
Tyr. 187.

⁴ Woolrych, p. 305; *Mayor of Exeter v. Warren*, 5 Q. B. 773; *S. C.*, Dav. & M. 524.

⁵ *Layburn v. Crisp*, 4 M. & W. 320, 325.

“establishment; advantageous to the public by encouraging a valuable fishery; and highly beneficial as tending to the preservation of human life. . . .

“Wherever customs are set up, judgments in cases between parties are admissible to prove or disprove such customs.”¹

A toll reasonable in amount, but varying from time to time according to the value of money, is valid in law.² The right to vary tolls.

Equality clauses are however expressly introduced into all modern Acts empowering companies to levy tolls, which provide that the tolls shall not exceed the maximum allowed by the Act.³

On this the case of *Hungerford Market Co. v. City Steamboat Co.* is important.⁴

By sect. 76 of 11 *Geo. IV. c. lxx*, the Hungerford Market Company were empowered to take from the masters of steamboats in respect of passengers landing on or embarking from the wharf authorized to be erected by them such tolls within the maximum of 2*d.* for each passenger as should “at any time or from time to time be fixed and appointed by the company.”

By sect. 53 of 6 & 7 *Will. IV. c. cxxxviii*, for building a foot bridge over the Thames from Hungerford Market, called “the Charing Cross bridge,” reciting that it was contemplated that the northern pier of the bridge should be a landing place for passengers embarking or disembarking at the pier, or from any float attached thereto, the company were empowered to take the same tolls as they were empowered to take at their wharf under their former Act. The bridge having been built, and the northern pier having been used as a landing place, the plaintiffs resolved that the toll to be paid should be 2*d.*, subject to such

¹ *Lord Falmouth v. George*, 5 Bingh. 286; 2 M. & P. 457.

² *Laurence v. Hitch*, 9 B. & S. 467.

³ See Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20,

s. 90); Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27, s. 30). See also 8 & 9 Vict. c. 28, ante, p. 480.

⁴ 7 Jur., N. S. 67; 30 L. J., Q. B. 25; 3 L. T., N. S. 732.

“ modifications as may have been agreed on, or may here-
 “ after be agreed upon in any particular cases, between
 “ this company and the owners or proprietors of steamboats
 “ or vessels.”

By sect. 125 of 6 & 7 *Will. IV. c. cxxxiii*, the tolls to be taken by the Hungerford Bridge Company by virtue of that Act were to be charged equally, and no reduction or advance in them was either directly or indirectly to be made in favour of any particular person or company:—Held, 1st. That there was no obligation on the plaintiffs to impose an equal toll on all persons or steamboat companies; and that sect. 76 of 11 *Geo. IV. c. lxx* did not restrain them from making agreements with steamboat companies for a lower toll than that fixed and appointed; 2nd. That sect. 125 of 6 & 7 *Will. IV. c. cxxxiii* applied only to tolls taken by the bridge company, and not to the defendants.¹

Where certain justices convicted a person for taking a toll greater than by law he was allowed to do, and a rule was obtained to remove the case into the Court of King's Bench; held that a mere claim of a right to take certain tolls, without showing clearly that it is a *bonâ fide* claim, is not sufficient to oust the justices of their jurisdiction to convict for taking them improperly.²

Power to take tolls entails on bodies incorporated by statute same liability as would exist in individuals.

The power to take tolls entails on bodies incorporated by statute the same liabilities as would exist in the case of individuals, and which liabilities form part of the consideration necessary to support a toll. “Where a body (such as the Mersey Docks and Harbour Board) is constituted by statute having the right to levy tolls for their own profit, in consideration of their making and maintaining a dock or canal, there is no doubt of their

¹ See remarks of Cockburn, C. J., as to the power of the company to vary tolls and on Lord Ellenborough's judgment in *Lees v. Manchester and Ashton-under-Lyme Canal*, 11 East, 645.

² *Rex v. Hampshire Justices*, 3 D.P. C. 47. See, too, as to the alteration and variability of tolls, *Lancum v. Lovell*, 6 C. & P. 463; *Barton v. Bennett*, 12 W. R. 709, Q. B.

“liability to make good to the person using it any damage occasioned by their neglect in not keeping the works in proper repair.”¹ Therefore, such a corporation being empowered by Act of Parliament to make and maintain docks for the use of the public, and to take tolls from persons using them, was held liable to the owners of ships in actions for negligence, as long as the docks remained open for the public, and was held bound, whether they received the tolls for beneficial or fiduciary purposes, to take care that the docks were navigable without danger.²

Even where such bodies receive tolls for beneficial or fiduciary purposes.

Tolls granted by statute may be extinguished either by the act of God or by law.³

Tolls, how extinguished.

It would appear that in order to pass any interest by a *Lease of tolls* a deed is necessary. Thus where certain tolls traverse of a bridge were let, but not by deed, it was held that no interest passed, and that the owner of the bridge was therefore rateable in respect of his beneficial occupation.⁴

Lease of tolls.

*Swatman v. Ambler*⁵ was an action of debt on an indenture bearing date 27th December, 1849, and made between five commissioners of an inland navigation, under the authority of several Acts of Parliament, of the one part, and the defendant of the other part, whereby the commissioners, in consideration of a certain rent, demised the tolls of the said navigation to the defendant for a year from the 1st of January, 1850, at the rent of 3470*l.* together with certain other payments, and the defendant covenanted with them, and also with the whole body of the commissioners, as a separate covenant for the payment of

¹ Lord Cranworth, L. C., in *Mersey Dock Co. v. Gibbs*, 11 H. L. Cas. 686; 12 Jur., N. S. 571.

² *Ib.* (affirming the judgment of the Court of Exchequer Chamber, 8 Jur., N. S. 486); *Parnaby v. Lancaster Canal Co.*, 11 Ad. & E. 213; *Mersey Dock and Harbour Board v. Cameron*, 11 Jur., N. S. 746. See *ante*, p. 271, and p. 455.

³ *Brown v. Mayor of London*, 9 C. B., N. S. 726; 17 Jur., N. S.

755: affirmed on appeal, 13 C. B., N. S. 82.

⁴ *Reg. v. Marquis of Salisbury*, 3 N. & P. 476, Q. B.; 8 A. & E. 716.

⁵ 8 Exch. 72; 22 L. J., Exch. 81. See the judgment of Martin, B.; and cf. *Pitman v. Woodbury*, 3 Exch. Rep. 4; 22 L. J., Exch. 83; and the judgment of Parke, B., therein.

the rent. Breach, non-payment of the rent. Plea that the commissioners never executed the lease, and that the entry and occupation was at the will of the commissioners only, and not under the demise. Replication that the defendants had entered, and had received and enjoyed the tolls, &c. by the permission of the commissioners, under the terms of the indenture. Held, that as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise and under its terms, and therefore that he was not liable to be sued on his covenant on the lease.

Right of distress incident to tolls.

A right of distress is incident to every toll,¹ and the distress may be made on the thing itself in respect of which the toll is due, or on any portion of it, as on a ship or any part of it for a toll due on goods exported in the ship.²

Tolls incident to rights of water.

Having thus indicated some of the points which it was necessary to consider with regard to the general law of tolls, we will proceed to consider those incident to the rights of water, in the following order:³

Customary	}	I. Tolls on the sea and navigable rivers,
Tolls.		which will be found to include port tolls. ⁴
Statutory	}	II. Tolls for harbours, lighthouses, docks,
Tolls.		and piers.
		III. Tolls in canals.

¹ Gunning, p. 216; Bac. Abr. tit. Distress, pl. 6; Vin. Abr. tit. Toll, I.; *Heddy v. Wheelhouse*, Cro. Eliz. 558; and *post*, p. 591.

² Gunning, p. 216. *Vinkensterne v. Ebdon*, 1 Raym. 386; 1 Salk. 248; Carth. 357.

³ While the first class of tolls are created only by grant, custom, or prescription, it will be found that the second and third are for the most part levied on the authority of Acts of Parliament. There are also certain species of tolls closely connected though not entirely identical with port tolls, which

Lord Hale (see p. 564, *post*) terms shore tolls, which sometimes are originated by custom and sometimes by statute. The division, therefore, of tolls *customary*, tolls *partially statutable* and *partially customary*, and tolls *statutory*, might have been adopted. It would not, however, seem to be so convenient in a work treating specially on tolls incident to water, and it has, therefore, been deemed better to follow the method adopted by Woolrych.

⁴ For ferry tolls see *ante*, Chap. VIII.

"The rights of water," says Woolrych,¹ "are not in general liable to tolls. Indeed, it may be laid down as a principle, subject to certain qualifications which will be stated by and by, that public waters are exempt from any claim of this kind. They are the birthright of every man, and a duty cannot therefore be imposed in respect of such privileges." Hence no toll is demandable from vessels navigating the high seas, which have been called "the great highway of the world;"² and there can be no prescription to take toll on an ancient navigable river,³ which is in the nature of a highway, and where, if the water alters its course, the way alters also.⁴

This freedom from toll, however, is subject to two exceptions,⁵ both in the case of the sea and navigable rivers. As has been stated above, toll over a public highway is usually toll thorough, and a prescription for toll thorough⁶ cannot be supported in law unless a good consideration be shown for it, though toll traverse, where a consideration is implied, may.⁷ Hence the exceptions referred to occur, 1st, where benefits are done to the community at large, which form a good consideration for a toll; and 2nd, where a toll is created by the legislature.⁸

With regard to navigable rivers, as well as to tolls generally, the case of *Mayor of Nottingham v. Lambert*,⁹ which has already been alluded to, is of great importance.

It was a case on a special verdict, in which the plaintiffs declared that Nottingham has been time out of mind a town corporate, and called by several names according to the several charters set forth in the declaration. That the

Tolls on the sea and navigable rivers.

But to this there are two exceptions.

1. Where benefit is done to the community.

2. Where toll is created by legislature.

Mayor of Nottingham v. Lambert.

¹ Woolrych, Law of Waters, p. 298.

² *Ib.* p. 299.

³ *Mayor of Nottingham v. Lambert*, Willes, 111; cf. Lord Chelmsford in *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 223.

⁴ Gunning, p. 19. Com. Dig. tit. Chem. A. 1; citing Thorpe, J., 22 Ass. 93; and cf. Gunning, p. 18; 10 Mod. 384; *Wilkes v.*

Kirby, 1 Lutw. 490; 2 Lutw. 1519.

⁵ Woolrych, p. 299.

⁶ See *ante*, p. 536.

⁷ *Mayor of Nottingham v. Lambert*, Willes, 111.

⁸ Woolrych, p. 299.

⁹ Willes, 111. The case was twice argued, first, on 1st June, 1738, and again on the 2nd November of the same year.

manor of Nottingham is an ancient manor, and that time out of mind till 15th September, 28 *Hen. VI.*, it was parcel of the county of Nottingham, and from that time and still is within the county of the town of Nottingham.¹ That the river Trent in and throughout the said manor is, and time out of mind hath been, an ancient navigable river; and that the mayor and burgesses of Nottingham, and all their predecessors by their several names, have time out of mind had and received and used, and ought of right to have and receive, by their ministers and servants a certain duty or toll of every master or navigator of every boat, barge, or other vessel laden with goods, wares and merchandize navigated on the said river Trent through the manor aforesaid (the said master or navigator being a foreigner and not a burgess or freeman of the said town), viz. 2*d.* a ton for every ton of goods loaden and being upon any vessel so navigated as aforesaid.

Then they set forth that the defendant was a foreigner and not a burgess or freeman; that he became indebted to the plaintiffs, &c., and being so indebted promised to pay and hath not paid, &c. Likewise they further declare for a toll for passing through a certain bridge.

The jury found a special verdict on the first count (to which the defendant pleaded the general issue that he had made no such promise), affirming the matters alleged in the declaration, and also "that there was not any consideration proved to them at the trial for the payment of the said duty or toll," and concluded as usual, submitting the matters of law to the judgment of the court.

Willes, C. J., who delivered the opinion of the Court, was of opinion that the toll claimed was a toll thorough, that a prescription for toll thorough in a navigable river cannot be supported in law unless a consideration be shown for it, and that, as in this case no consideration was proved,

¹ Which was made a county of itself by the charter of 15th September, 28 *Hen. VI.*, the last charter that of October 19th, 4

W. & M., incorporating the plaintiffs by the name of the Mayor and Burgesses of the town of Nottingham.

judgment must be given for the defendants. The plaintiffs did not claim as lords of the manor or owners of the soil of the river; but from the case of *Gann v. Free Fishers of Whitstable*,¹ cited hereafter, which decides the point with regard to tidal estuaries, it may be presumed that such a claim could not be supported even in non-tidal waters without consideration.

Commenting on this case, Woolrych² observes: "Hence
"it appears that there are two cases in which toll may be
"had upon a public river; 1st. Where a sufficient con-
"sideration appears, and 2nd. Where the nature of the
"benefit is such as to imply a consideration." As an
example of the first named instance, he cites an action for
toll³ brought by the mayor and burgesses of Gloucester
in respect of every boat passing up the river—when the
claim was allowed; and for the second case he adduces as
an authority *Roy v. The Corporation of Boston*,⁴ where *quo*
warranto was brought against the corporation for demand-
ing toll thorough, and they justified the demand by reason
of a consideration for repairing a bridge and a pavement,
and also a sea bank, when the Court held, that although
toll thorough could be claimed as such without more, yet
as here it was founded upon a consideration, it should be
deemed good.⁵

There can be
no toll on a
public river
save where
there is suffi-
cient consider-
ation, or a
benefit to the
public imply-
ing such con-
sideration.

¹ 11 H. L. Cas. 192. See *ante*, p. 48, and *post*, 558.

² P. 303.

³ *Ib.* 21 Hen. VII. 16.

⁴ *Ib.* Cro. Eliz. 11, by Popham, C. J. Sir W. Jones, 162.

⁵ Cf. *Haspurt v. Wills* (1 Mod. 47; S. C. 1 Ventr. 71; S. C. 8th ed. 454, nom. *Heshod v. Wills*; S. C. 2 Keb. 624, 665; and see Woolrych, pp. 301, 302; and Gunning, pp. 624, 665); and *Colton v. Smith* (1 Cowp. 47; and see Woolrych, p. 301; and Gunning, pp. 7, 31, 33). The first was a special action upon the customs of wharfage and craneage in the city of Norwich. The declaration stated that there was a common

wharf with a crane to it, and that there was a custom for all goods brought down the river and passing by to pay a duty. It was objected that this claim of toll was bad, being for toll thorough. "If," said Mr. Justice Twisden, "they, the citizens, had unladed at the quay, they should have paid the whole duty, or even had they done so at some other place within the city, there might have been some reason for the charge, or had they cleansed the river." The learned judge added, "that there had been a toll claimed at Gravesend for boats lying in the river Thames, which had been adjudged ill by Parlia-

All the principal navigable rivers of the kingdom are now under the control of conservators incorporated by particular statutes, which regulate the amount and mode of levying tolls thereon. Such tolls, being statutory tolls, will fall within the rules to be noticed hereafter.¹

Tolls on the sea only demandable where such consideration as a port can be shown.

With regard to the sea, the rule laid down as to navigable rivers will be found to hold good, and toll may be lawfully demanded where private exertions have succeeded in forming a port, harbour, or quay, so as to be beneficial to the public;² or where accommodation is made on the land of any party demanding therefor a toll.³

We will now, therefore, proceed to tolls relating to ports.

Ancient ports of the realm free of toll to all subjects of the realm.

Of common right the subjects of the king have the liberty of using the ancient ports of the realm, and they are as free to all as the king's highway; and those who seek to restrain them of this free liberty, ought to show a meritorious consideration—a *quid pro quo*.⁴

"If a man," said Lord Hale, C. J., in *Warren v. Prideaux*,⁵ "will prescribe for a toll on the sea, he must allege a good consideration, because by Magna Charta and other statutes, every one hath a liberty to go and

"ment."

The second-named case was an action for tolls for landing goods on a wharf at Gainsborough. Declaration stated that the plaintiff was lord of the manor of Gainsborough, and that he and all those, &c. had used to keep and repair a *wharf* within the manor, and that in consideration thereof they had been used to receive toll for all goods landed *within the manor*, not confining it to the wharf, which alone the declaration stated the plaintiff to have maintained. The plaintiff having recovered, the defendant afterwards moved in arrest of judgment, on the ground that the prescription laid was too large for the consideration alleged; but the Court thought otherwise, Lord Mansfield,

C. J., observing "that everybody that paid had a benefit of it, and if they landed their goods elsewhere within the manor, they landed them on the private property of the plaintiff, and originally, indeed, the lord was the owner of all the lands in the manor, and the prescription was good according to many cases."

¹ See *post*, 569.

² Woolrych, p. 299.

³ *Ib.* In the second case the toll will be traverse, in the first usually thorough.

⁴ Gunning, p. 3, &c. &c.

⁵ See Gunning, p. 20 (1 Mod. 104; S. C. 3 Keb. 249, 275; S. C. Sir T. Raym. 232; S. C. 2 Lev. 96, reported as *Prideaux v. Warne*, S. C. Freem. 355, under the same name).

“come upon the sea without impediment. If defendant had said that he had a port, and was bound to maintain that port, that might have been a good prescription. But in this case there must be a special inducement, and compensation to the subject, by reason of those statutes by which all merchants and others have liberty to come and go out.” There a prescription for toll was claimed in consideration of maintaining a certain quay, and a bushel of salt had been immemorially taken from every ship which came laden with salt into Slipper Point. The ship in question came within Slipper Point, and was distrained for toll. It was contended that the avowry could not be supported for want of a meritorious consideration, and although the Court were of that opinion, and so against the prescription, yet they distinctly held, that if the prescription had been for a port, it would have been good.¹

In *The Mayor of Yarmouth v. Eaton*,² Lord Mansfield, C. J., said: “The plaintiffs set out that they have a right by prescription to the port duties of Yarmouth; and the question is, whether they are obliged to set out a consideration. The only cases like the present are port duties, the rest are out of the question. The making a port is itself a consideration—it is a self evident convenience to the merchants; it speaks for itself; it may never require repair—therefore I do not know that it is necessary to show repair. The ownership of the soil is out of the case.” The plaintiffs, therefore, had judgment.³

The law relating to the erection and creation of ports has already been discussed in a previous chapter,⁴ and it will, therefore, only be necessary to recapitulate some few

¹ See Woolrych, p. 360.

² See Woolrych, p. 301, 3 Burr. 1402; and see Gunning, pp. 23, 24; and see *ante*, p. 538, n. 1.

³ *Topsell v. Ferrers*, Hob. 175;

Mayor of London v. Hunt, 3 Lev. 37; *Exeter, Mayor of, v. Trimlett*, Trin. 32 Geo. II. were referred to for the plaintiff.

⁴ See *ante*, Chap. I. p. 42 *et seq.*

points respecting it which are necessary to the explanation of the present subject.

The erection of ports is a royal prerogative.

It is part of the royal prerogative to erect public ports in the kingdom;¹ and the Crown has therefore a special interest in the franchise of a common port, and consequently no subject can erect one without a charter or lawful prescription, either for all comers or for the men of a particular fee or precinct, as for his own tenants.²

Every public port is a franchise.

Lord Hale states³ that "Every public port is a franchise or liberty, as a market or fair, and much more,—
"for 1st, It is a place of common resort of merchants and shipping; 2nd, Every port had of necessity a market belonging to it, as well for the vent of merchandizes that were imported or to be exported, as for the vent of victuals and provisions for the supply of mariners and victualling of ships; and 3rdly, To every public port there were certain *common tolls* incident, as for wharfage and land leave, and the like, which by law cannot be taken without a lawful title by charter or prescription."

Title thereto involves the question of 1, *caput portus*, and 2, that of interest of franchise.

The question of the title to a port involves, according to Lord Hale,⁴ *two* considerations,—
"1st, That of the *interest* of the soil both of the shore and town, which is the *caput portus*, and also of the haven itself, 'wherein ships ride or apply;' and 2nd, That of the *interest of franchise*, or the liberty itself,—that civil signature which doth give the liberty of public arivage, which is in truth the *formale constituens* of a port in a legal signification."

Both of these interests "may be acquired by prescription; and upon this title a port may as well belong to a subject as to the Crown, as well in point of property in the soil as in point of franchise, of which several instances are given by Lord Hale, *inter alia* Liverpool, Milford, Poole, Topsham, and others."⁵

¹ *Ball v. Herbert*, 3 T. R. 261.

² Gunning, p. 114. Hale, de P. M., part 2, ch. 2, p. 51.

³ De Portibus Maris, part 2, ch.

2, p. 50.

⁴ De Port. Maris, part 2, ch. 2, pp. 71, 72.

⁵ Gunning, pp. 115, 116, 117.

There are two kinds of ownership of a port which the Crown *primâ facie* has, but which a subject may have, and these are,—1st, The ownership of property; and 2nd, The ownership of franchise,—both of which usually concur in the same person, though they may be divided.¹

The first occurs where the Crown, or a subject by charter or prescription, is owner of the soil of a creek or haven where ships arrive and come to shore, and may belong to a subject, though he has not thereby the franchise of a port, neither can he so use and employ it unless he has that liberty by charter or prescription. He may bring his own boats thither to import and export his own goods that are not customal; but he cannot use it as a public port, or admit foreigners, or take toll or anchorage.¹

The second species of ownership gives the formality or denomination of a public or lawful port for ships to lade or unlade their merchandize at; and this, as has been said, may be acquired by charter or prescription. And although the soil of a creek or harbour may belong to A., the Crown may grant there the liberty of the port to B.; but if A. have bank of the port, the Crown cannot grant to anyone a liberty to unlade his goods upon the bank without A.'s consent, although such liberty may by custom be free to all.²

“From this *jus dominii* of property or franchise, or of both, there arise several *port duties*, sometimes called *portatica*, sometimes *tolls*, sometimes *customs*,—some of which are incident to the ownership of the port, while others are due only by special usage or prescription.”³

Port dues arise from the *jus dominii* of property or franchise.

The *dues incident to the ownership of a port* are—

1. *Anchorage*³—A toll for anchoring a vessel in the port, Anchorage.

¹ See Gunning, pp. 116, 117; Hale, de Port. Maris, part 2, ch. 6, p. 72.

² Gunning, p. 117.

³ Cf. *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192; and *Free Fishers of Whitstable v. Foreman*, L. R., 2 C. P. 688, both of

which see *ante*, p. 48 *et seq.*, and *post*, p. 558 *et seq.*

But little is said of anchorage in the books, and it is not mentioned in Comyn or Viner or Bacon. Lord Hale mentions Plymouth as an instance where the shore of the harbour belongs to

which properly and *primâ facie* arises from or in respect of the soil, of which it is evidence, but sometimes it is due to the owner of the franchise merely.

Ballastage. 2. *Ballastage*¹ of ships—A toll for the liberty of taking up ballast from the bottom of the port, and arising out of the property in the soil. In the Thames this liberty is granted by the Crown to the Corporation of the Trinity House, and the amount per ton which the corporation may charge the masters of vessels for ballastage is restricted by statute.

Duties due to owner of a port by custom. The duties due to the owner of a port by custom or prescription are various, and differ in various ports, but the following may be enumerated:²—

Busselage. 1. *Busselage*,³ which Lord Hale mentions as claimed at Hull, and one of the profits which were answered for “to the King and Dukes of Cornwall in the Port of Plymouth.”

Keelage, &c. 2. *Keelage*—“For every vessel coming within the port “a certain toll.”⁴

Besides these, may be mentioned *petty customs*,⁵ *average*, *primage*,⁶ *petty loading*, *lastage*, *prisage*,—all of which may lawfully be taken by prescription in a port.⁷

These duties were sometimes called *tolls*, sometimes *consuetudines*, from which, when in the king’s hands, he might grant a discharge by charter, but which, when they were already in a subject or corporation, either by grant or prescription, he had no power to exempt anyone from pay-

one, and the anchorage to the lord of the port in point of franchise. Gunning, p. 117.

¹ Cf. *Trinity House v. Staples*, 2 Chit. p. 689.

² Gunning, p. 117.

³ Cf. *Serjeant v. Reed*, 2 Str. 1228; *S. C.* 1 Wils. 91; Woolrych, 301.

⁴ *Ib.* Hale, de Port. Maris, part 2, ch. 6, p. 72; and see part 3, ch. 4, p. 132.

⁵ “In the king’s grant of the “fee farm of the port and city of “Exeter are mentioned certain

“duties called *petty customs*, which “are small rates paid in respect of “goods imported—*e. g.*, those “prizes and customs belonging to “the king in his port of Newcastle, “which are set forth in record, “20 Ed. I.” Hale, de Port. Maris, part 3, ch. 4, p. 132; see Gunning, p. 117.

⁶ Cf. *Bradley v. Newcastle-on-Tyne*, 2 El. & Bl. 427, which see *post*, p. 563.

⁷ Hale, de Port. Maris, part 2, ch. 6, p. 74.

ment of. They would pass under the words "*Omnes consuetudines*" or "*tolneta portus de A.*"¹

Lord Chelmsford, in his judgment in *Gann v. The Free Fishers of Whitstable*,² commenting on Hale's³ account of the port duties above mentioned, said: "It appears to me that the correct interpretation of his language is, that without the king's grant or charter a subject cannot have the franchise of a port, and without having a port he cannot take toll or anchorage, which are dues arising from and incident to it."

A port may be created in modern times with a right to receive a port duty from all who come within its limits. A port duty *ex vi termini* implies a consideration for it.⁴ Ports may be created in modern times —port duties.

"There is no doubt a port duty may be created within time of memory. The Crown may grant to the subject the right to create a port, and may grant to the owner of the port, the person under an obligation to repair, the right of receiving a consideration for all who use it,—a right to receive so much for every quantity of coals or other commodity imported into the port. The subject receives for that duty an equivalent in repairs of the port, and the advantage he derives from it."⁵

Where, however, a party⁶ suing for port duties as owner of a port, gave no other evidence of title than the continual payment of a certain duty, which the jury found unreasonable in amount; it was held that he could not have a verdict for a less amount found by the jury to be reasonable.

¹ Hale de Port. Maris, part 3, ch. 4, p. 132.

"The fullest account of this kind of dues is in an old book called '*Consuetudines et usus Sandaici*,' mentioned by Lord Hale, (part 3, ch. 2, p. 118; ch. 4, p. 133), and there is a long enumeration of them in *Mayor of Waterford's case* (Davy's Rep. 6);" Gunning, p. 117.

² 11 H. L. Cas. pp. 219, 220.

³ De Port. Maris, ch. 2, p. 46;

ch. 6, pp. 73, 74.

⁴ *Jenkins v. Harvey*, 1 Gale, 23.

⁵ *Ib.* per Parke, B. p. 27.

⁶ *Brune v. Thomson*, 4 Q. B. 543. Semble, that where the duty is claimed under a grant from the Crown, which appears on the evidence to be enrolled of record, but is not produced by the plaintiff, the jury ought not to be directed to presume such grant upon mere evidence of usage.

Lord Denman, C. J., said, *inter alia*, "We think the jury could not properly be told that they might presume a grant where the plaintiff refused to produce it, especially a grant of a toll of unreasonable amount. This would be pressing the doctrine in *Jenkins v. Harvey*¹ too far. The doctrine held in that case is not indeed altogether satisfactory, and any person affected by it ought to have an opportunity of tendering a bill of exceptions. We also think it open to question whether the Crown can grant a right of taking toll indefinitely throughout a port beyond the limits of the grantee's land, and where the grantee may not even have it in his power to do repairs. The question, too, as to the legality of applying ancient port duties to new objects of commerce raised in the *Liverpool case*, but not decided, is proper to be considered."

The decisions on the subject of ports turn chiefly on the validity of the custom or prescription in virtue of which they claim toll.

Customs by virtue of which toll is claimed must be well supported.

In *Vinkensterne v. Ebden*² a custom was alleged that the mayor and burgesses of Newcastle had been accustomed from time immemorial to repair the port of their town, and that they had used to have a toll of 2*d.* per chaldron for all coals exported. The Court considered this a very reasonable custom; for without ports there would be no navigation, and without a duty the port would not be repaired.

In assumpsit for weighage of goods brought into the port of London, it was objected that there was no consideration for the duty; but as the defendant had the liberty of bringing his goods into port, which is a place of safety, it was resolved that the consideration was implied.³

In *Lord Falmouth v. George*,⁴ it was held that keeping

¹ 1 Gale, 23; 1 C., M. & R. p. 300.
849.

² 1 Ld. Raym. 384; *S. C.*, 1 Salk. 248. See, too, *Gunning*, pp. 28, 62, 119, 216; *Woolrych*,

³ *Mayor of London v. Hunt*, 3 Lev. 37; *Gunning*, pp. 29, 33, 118; *Woolrych*, p. 30.

⁴ 5 Bingh. 286.

up a capstern and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, was a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstern or not; and the custom to exact the toll was also held good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shown to have been such; but he and they had always been owners of the spot on which the capstern stood, and of an estate in the neighbourhood.

A fisherman frequenting the cove was, however, held not to be a competent witness for a party resisting the toll.¹

In that case the plaintiff sought under a custom to establish a claim to the second best fish out of every boat load of fish landed in Senan Cove in Cornwall. A verdict having been found in his favour, a rule nisi was obtained by Bosanquet, serjeant, to set it aside, but the case having been argued before Best, C. J., the rule for a new trial was discharged, the Court saying:²—"It has been objected
 " that there was no consideration for the custom for taking
 " toll from the owners of boats who did not make use of
 " the capstern to draw up their boats from the sea. Al-
 " though it is not always necessary to use the capstern,
 " yet if boats in certain seasons could not safely approach
 " this place unless they were certain of having the assist-
 " ance of the rope of the capstern to draw them out of the
 " surf of the sea, we think that the keeping of the capstern
 " and rope ready for the use of fishermen who resort to
 " this cove is a sufficient consideration for a toll to be paid
 " by them, whether they actually use it or not. . . .

" There is no doubt that the King may at this time
 " establish a reasonable toll for the performance of any
 " duty that the public convenience or safety requires should
 " be performed. The creation of a toll is only a mode of
 " paying for a public service. The power of creating tolls

¹ 5 Bingh. 286.

² 5 Bingh. 291, 292.

“depends upon the necessity of the service and the reason-
 “ableness of the toll taken for it. If the service be not of
 “public advantage, or the toll be unreasonable, it cannot be
 “supported. But it is impossible to contend that this
 “capstern and rope is not of the greatest importance to
 “these fishermen. And it was not suggested either at the
 “trial or in the argument here that the toll demanded was
 “excessive or unreasonable. If the plaintiff had purchased
 “this land a year ago and had made a landing-place in
 “this cove, had built a capstern, provided a proper rope,
 “and undertaken to keep the capstern and rope in a proper
 “state at all times for the use of the fishermen it would
 “have been a sufficient consideration for the grant of such
 “a toll by the Crown, as the jury have found was due to
 “the plaintiff by virtue of a custom. . . . We have
 “therefore no doubt that this is a valid custom. In the
 “case of *The Earl of Falmouth v. Penrose*¹ the validity of
 “the custom was never disputed; the objection then taken
 “was that the pleadings were not applicable to the case
 “proved.”

Claim for anchorage dues cannot be made merely in respect of the use of the soil.

A claim of anchorage dues cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage dues.² Evidence of mere immemorial usage will not support such a claim.² A liability to make compensation for actual injury done to certain oyster beds by anchoring, is therefore not to be confounded with a liability to toll for casting anchor in the soil itself.³

Lord Chelmsford, in his judgment in *Gann v. Free Fishers of Whitstable*,⁴ said: “My Lords, the principal

¹ 6 B. & C. 385.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192; 35 L. J., C. P. 29; 20 C. B., N. S. 1; 13 W. R. 589; and see *ante*, Chap. I. p. 48 *et seq.*; *Free Fishers*

of Whitstable v. Foreman, L. R., 2 C. P. 688; 36 L. J., C. P. 173; L. R., 4 H. L. 266.

³ *Ib.* Cf. *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁴ 11 H. L. Cas. 215, 222, 223.

“ question intended to be raised between the parties in this
 “ appeal is, Whether the respondents, the Company of
 “ Free Fishers and Dredgers of Whitstable, who are
 “ owners of a fishery for the growth and improvement of
 “ oysters within the limits of the manor of Whitstable,
 “ are entitled to demand from the appellant a payment
 “ for anchoring his vessel within the manor; their title
 “ to demand such payment being derived from the
 “ lord of the manor, whose predecessors have from
 “ time immemorial received a customary payment, ‘for
 “ ‘ and on account of the anchorage of any ship or
 “ ‘ vessel within the said manor.’ . . . In considering
 “ the question it is necessary to bear in mind that it applies
 “ exclusively to the claim of a toll or due for anchoring on
 “ the high seas, and not in any port or haven. . . I have
 “ therefore arrived at the conclusion that the undoubted
 “ right of the public freely to navigate the highway of the
 “ sea cannot be restricted by the imposition of any payment
 “ whatever unless some good consideration can be shown
 “ for it; and the respondents have failed to establish any
 “ other ground of title in the lord of the manor to the
 “ anchorage due than the mere use of their soil. I con-
 “ sider this to be wholly insufficient to justify the demand
 “ in question, unless it can be held that the right of naviga-
 “ tion does not include the right of anchoring, which can
 “ hardly be seriously contended.

“ I admit that every intendment ought to be made in
 “ favour of a payment which has been uninterruptedly
 “ received time out of mind, supposing it presumably
 “ capable of a lawful origin; but not being able to dis-
 “ cover any ground upon which this claim of an anchorage
 “ due could have had a legal commencement, the case of
 “ *The Mayor of Nottingham v. Lambert*¹ is an authority
 “ for showing that no length of prescription can give it
 “ validity.”

But in case of
 a navigable
 arm of the sea,
 if claim be pre-

If, however, a claim for anchorage dues on a navigable

¹. Willes, 111.

sumably capable of a legal origin, every intendment will be made in its favour. arm of the sea be presumably capable of a legal origin, and the payment of dues is shewn to have been uninterruptedly received time out of mind, every intendment will be made in its favour.¹

In *The Free Fishers of Whitstable v. Foreman*,² an oyster fishery had been possessed, and an anchorage due had been claimed and received from time immemorial by the lords of the manor of Whitstable, in respect of all vessels casting anchor within the limits of certain anchorage ground within the manor. In 1795, the fishery and soil thereof (including the anchorage ground) were conveyed by the lord, with all its rights and appurtenances, to the plaintiffs, who thenceforth claimed and received the anchorage due. There was some evidence that Whitstable was a limb of the port of Sandwich; but there was no direct evidence to show that the anchorage ground was within or connected with the port, or that the franchise of the port was ever granted out by the Crown. There was, however, evidence that the lord of the manor was the owner of a landing place called Le Craston, within the limits of the manor, and that he took toll upon merchandise landed there, and also that he was the owner of the anchorage ground, and took the anchorage due as such lord and owner of the soil. The recitals in the Act of Parliament, by which the plaintiffs were incorporated and empowered to purchase the manor and manorial rights, stated that there were "customary" payments, usually and of right, made to the lord of the "manor for or in respect of any ship or vessel on the landing" of goods or merchandise within the said manor." There was also evidence that the plaintiffs had, as far back as living memory extended, maintained buoys and beacons, which served the double purpose of pointing out the channel by which vessels of small burthen might safely reach the anchorage ground, and also of protecting the oyster beds:—Held, that the maintenance of the buoys

¹ *Free Fishers of Whitstable v. Foreman*, L. R., 2 C. P. 688; 36 L. J., C. P. 173; L. R., 4 H. L. 266.

and beacons, taken in connection with the ownership of the soil of the anchorage ground, and the benefit to the public therefrom, afforded a sufficient consideration to support the plaintiff's claim to the anchorage due.

Bovill, C. J., in delivering the judgment of the Court,¹ contrasted this case with that of *Gann v. The Free Fishers of Whitstable*, noticed above.

"The right claimed by the plaintiffs in this case is similar to that which was questioned in the case of *The Free Fishers of Whitstable v. Gann*, viz., the right to an anchorage due from all vessels casting anchor on certain land covered by the sea, called the anchorage ground, near Whitstable, in the county of Kent. In the former case the right was sought to be maintained by reason of the plaintiff's ownership of the soil, upon which the anchors were cast. . . . The plaintiff's case being on that occasion based upon the ownership of the soil, their evidence had been directed to that point alone. No facts appeared from which the claim could be supported upon any other grounds, and the ultimate decision upon the then statements of their case were adverse to the plaintiffs. The present case is brought before us now in a different form. The claim is not now based upon the mere ownership of the soil of the anchorage ground; and we are called upon to decide whether, under the circumstances set forth in this special case, the plaintiffs have established their right to the payment in question.

"The view which we take of this case is entirely in accordance with the decision of the House of Lords, which was that the claim could not in point of law be supported in respect of the ownership of the soil alone." (His lordship then quoted the judgment of Lord Westbury, L. C.).² . . .

"In the former case no consideration whatever was attempted to be shown for the payment, no facts were

¹ Bovill, C. J., Willes, J., Keating, J., and Montague Smith, J.

² 11 H. L. 208; 20 C. B., N. S. 14.

“proved from which it could be inferred. . . . Upon
 “the statements in the case now before the court,
 “it seems to us that the defects which existed in the
 “former case have been supplied. The buoys and beacons
 “have been maintained as far back as living memory
 “extends; and we think we ought to presume that they
 “have existed and been maintained from time immemorial;
 “and when we find that the anchorage due has been re-
 “ceived without interruption during the same period, and,
 “therefore, ought to be referred to a legal origin, if it
 “can be done; we consider that the maintenance of these
 “buoys and beacons may be treated as the consideration
 “for the payment that has been so immemorially made;
 “and as there would be a benefit to navigation by point-
 “ing out the anchorage ground, and on a safe channel or
 “entrance to it, under the circumstances before mentioned,
 “we think there would, in point of law, be a sufficient
 “consideration to support the claim.

“Even if these buoys and beacons were maintained
 “wholly and solely for the purpose of preventing vessels
 “grounding upon the oyster beds, it is not certain that
 “this also might not be sufficient consideration upon the
 “principle stated by Lord Wensleydale in his judgment.¹
 “Our judgment is, however, founded upon the ground
 “which we have already stated, viz., the maintenance of
 “the buoys and beacons for the purposes and under the
 “circumstances before mentioned, in connection with the
 “plaintiff’s ownership of the soil and the uninterrupted
 “enjoyment of the anchorage due from time imme-
 “morial.”

This case was affirmed on appeal by the Court of
 Exchequer Chamber² and the House of Lords,³ on the
 ground that the evidence showed the former existence of a
 port in the *locus in quo* from the immemorial payment of
 the tolls for merchandize and anchorage; for as anchorage
 dues were almost, if not universally, incident to a port,

¹ 11 H. L. 216; 20 C. B., N. S.
 29.

² 13 L. T., N. S. 734.

³ L. R., 4 H. L. 266.

and as every intendment should be made in favour of a payment uninterruptedly made time out of mind, they were justified in drawing the inference that a port did exist, and therefore that the tolls had a legal origin.

In *Bradley v. Newcastle-on-Tyne*,¹ a charter of 3 Jac. II. Primage. granted to the corporation of the master pilots and seamen of Newcastle-on-Tyne primage (described in the charter as an ancient duty) upon goods brought by ship into the Tyne or any of the creeks of the port of Newcastle, of which Sunderland was one, to be rated and accounted in manner and form following, that is to say: aliens and strangers born, and all other persons arriving with ships in the Tyne or within any of the creeks, members of the port of Newcastle, and not belonging to the same, to pay before they departed with their ships; and every free merchant and inhabitant of Newcastle arriving in the Tyne with a ship, within ten days after landing the goods. The charter also granted to the corporation all other perquisites, ancient duties and profits, which they had theretofore lawfully had and enjoyed; and also provided, that the sums granted by the charter should be in lieu of all other duties theretofore received; it was held that the charter was not inconsistent with the claim of primage in respect of goods imported into Sunderland by merchants resident there, and also that evidence of usage was admissible in support of the claim.

Ancient charters, if ambiguous, are to be explained by the usage under them; and the jury in that case may interpret the charter by the usage. As in the instance of the above-named charter of 3 Jac. II., upon the issue of which a question was raised in 1851; when in the case of *Newcastle Pilots, &c. v. Bradley & Potts*, it was disputed whether the charter permitted primage to be taken of all ships entering Sunderland (a creek of Newcastle-upon-Tyne), or exempted ships belonging to merchants of Sunderland.² While delivering judgment, making the rule for a new trial

¹ 2 El. & Bl. 427; 18 Jur. 246. ² 2 El. & Bl. 428, note (a).

absolute, Coleridge, J., said: "The rule has never been laid down in this matter more strongly than in *Jenkyns v. Harvey*.¹ It has been questioned whether it was not there laid down too strongly;² but adopting the language used there it went no farther than this: that 'from 'uninterrupted modern usage,' a jury 'should find the 'immemorial existence of the payment unless some 'evidence is given to the contrary.'"

The same charter of *Jac. II.* granted to the master pilots and seamen of Newcastle-upon-Tyne, certain dues to be paid by all persons being *owners* of any goods which should be brought in any ship from beyond the seas into the river Tyne," in manner following: "that is to say, aliens and strangers born, and other such persons who, with their ships should arrive within the said port and not belong to the same, before they depart with their said ships from the said port, should pay the duties aforesaid, and every free merchant and other inhabitant of Newcastle, arriving with their said ships within the river Tyne, should pay the duties aforesaid within ten days after the landing of the goods as aforesaid, upon lawful demand." The duties had always been paid by the importer:—Held, that a person who gratuitously landed, entered, and warehoused goods for the owners, who resided in London, was an "owner" within the meaning of the charter, and liable to the dues.³

Shore duties which depend sometimes on custom and sometimes on statute.

The varieties of tolls hitherto noticed have been purely founded on custom; it will now be necessary to consider briefly certain duties closely connected with ports, though not identical with them, which are sometimes regulated by custom and sometimes by statute. These dues, which are termed by Lord Hale *shore duties*, arise by reason of interest in the soil of the shore of a port, and vary in different

¹ 1 C. M. & R. 877; 1 Gale, 23.

² *Brine v. Thompson*, 4 Q. B. 543, 552.

³ *Master Pilots and Seamen of Newcastle-upon-Tyne v. Hammond*, 4 Exch. 285.

places both in kind and amount. It is rare, he observes, to find any port where the owner of the franchise has not a convenient portion of the shore and land adjoining where wharfs and quays and warehouses may be built for the lading and unlading and safe custody of merchandizes; but the interests may be and sometimes are divided, and the duties arising by reason of the goods when unladen and laid on shore are different from those already spoken of. And it often happens that a particular place within a port may be of great convenience to make a common quay or wharf, when the property in the soil may belong to a subject, who is not the owner of the port, when either his interest must be bought in by the owner of the port, or he must have the benefits which arise by the taking or landing the merchandize there.¹

Of these duties the most important are *wharfage* and *craneage*. Wharfage
and craneage.

Wharfage is a toll or duty for the pitching or lodging of goods upon a wharf,² or "money paid for landing goods on a wharf or quay, or for shipping or taking goods into a boat from thence."³

"A duty for wharfage and craneage," said Lord Mansfield in *Stephen v. Coster*,⁴ "can not be due where the party has not had the use of the wharf or crane. Wharfage is due for *landing on the wharf*, and craneage for *the assistance of the crane*. Anchorage or moorage are very different things."

The owner of a wharf or quay is entitled at common law to remuneration for the use of them,⁵ and in *Serjeant v. Read*,⁶ the claim for wharfage was compared to that for stallage, the party bringing his goods to the wharf or quay having an easement, and the owner of the wharf or quay a damage. Owner of a
wharf entitled
at common
law to remuneration.

¹ Hale de Portibus Maris, Part 2, Ch. 6, p. 76; see Gunning, pp. 122, 123.

⁴ 3 Burr. 1409; 1 W. Bl. 413, 423.

⁵ Gunning, p. 123.

² Gunning, p. 123.

³ *Ib.*; Cunningham's Law Dict. tit. Wharfage.

⁶ 1 Wils. 91; 2 Stra. 1228; Woolrych, p. 301.

Amount may
be fixed by
prescription
or grant.

With regard to amounts payable for wharfage duty, in many ports they are fixed by prescription, or by the grant under which the owner takes them; or settled by statute,¹ and in both of these cases the amount so fixed cannot be exceeded, for it is part of that *jus publicum* which is vested in the community to have their access to ports as freely as formerly was used.² A. may also for his own private advantage in a port or town set up a wharf or crane, and take whatever rates he and his can agree for wharfage, craneage, &c.; for he does not more than what is lawful for every man to do,—viz. make the most of his own; and such are the coal, wood, and timber wharves in the port of London, and some other ports.³ In such a case, however, where private property, by consent of the owners, becomes invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit.³ Lord Ellenborough, C. J., in *Allnutt v. Inglis*,⁴ when speaking on this point, quoted Lord Hale. “According to him,” said his lordship, “wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port—as where he is the owner of the one wharf authorized to receive goods which happens to be built in a port newly erected—he is confined to take reasonable compensation only for the use of the wharf. Lord Hale puts the case either way: there the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either ‘because they are the wharves only *licensed* by the queen,’⁵ or because there is

¹ *E. g.* the duties in Hull are fixed by 27 Hen. VIII. c. 3, and 33 Hen. VIII. c. 33; see Gunning, p. 123.

² Hale, pp. 77, 78.

³ *Allnutt v. Inglis*, 12 East, 527.

⁴ 12 East, 527.

⁵ As to the prerogative of the Crown to ascertain the limits of ports and assign quays for the exclusive landing of merchandize, see *ante*, Chap. I., p. 44.

“ ‘ no other wharf in that port as it may fall out, in that
 “ ‘ case’ (he says) ‘ there cannot be taken arbitrary and
 “ ‘ excessive duties for craneage, wharfage, &c. ; neither
 “ ‘ can they be enhanced to an immoderate rate, but the
 “ ‘ duties must be reasonable and moderate, though settled
 “ ‘ by the king’s licence or charter.’ And then he assigns
 “ ‘ this reason, ‘ for now the wharf and crane and other
 “ ‘ conveniences are affected with a public interest, and
 “ ‘ they cease to be *juris privati* only.’ ”

In the above case the London Dock Company having built warehouses in which wines were deposited, upon payment of such rent as they and the owners agreed upon, afterwards accepted a certificate from the Board of the Treasury under the General Warehouseing Act of 43 *Geo. III. c. 132*, whereby it became lawful for the importers to lodge and secure the wines there without paying the duties for them in the first instance. It did not appear that there was any other place in the port of London where the importers had a right to bond their wines (though if the exclusive privilege had been extended to a few others, it does not appear that that would have varied the case) ; and it was held that such a monopoly, and public interest attaching upon their property, they were bound in law to receive the goods into their warehouses at a reasonable hire and reward.

Wharfingers in London are entitled¹ to wharfage for goods unladed into lighters out of barges fastened to their wharfs ;² and it appears that a custom exists in the same city of mooring barges for a tide at low water to the piles in front of the wharfs erected along the river ; but the custom does not extend to allow them to be moored to the wharf itself, except through distress.³

The amount to which a party claims to be entitled for Amount

¹ Under 22 Car. II. c. 11, and Order of Council of 1st March, 1674.

1 W. Bl. 413, 423.

³ *Wyatt v. Thomson*, 1 Esp. 252 ; see Gunning, p. 126.

² *Stephens v. Coster*, 3 Burr. 1409 ;

claimed must
be set forth
with cer-
tainty.

wharfage by prescription ought in a plea to be set forth with sufficient certainty.¹

To an action of trespass for seizing the plaintiff's barley, defendant pleaded that one R. D. was seised in fee of the manor of Penzance, in which there was a quay or pier, part of the manor; and that he and all those whose estate he had, at their own cost and time out of mind, repaired and ought to repair such quay or pier; and had of right taken a reasonable toll (called *barleyage*), to wit, three Winchester bushels of barley out of every ship's cargo brought upon the quay or pier, to be exported in any ship. The plea then alleged that the plaintiff brought upon the quay 1,200 Winchester bushels of barley to be so exported. A verdict having been found for the defendant, it was pleaded in arrest of judgment that the prescription, as set forth in the plea, was bad—being to take a certain out of an uncertain quantity: that it was uncertain, because “cargo” was too general, and unreasonable, as one fixed toll of varying quantities. But the Court held the prescription good; observing that the word “cargo” was a mercantile word well understood.¹

So, again, where the Corporation of Newcastle claimed 5*d.* for every chaldron of coals exported, and it was contended that this was unreasonable and excessive, being 5*d.* duty for a quantity of coals which was only worth 2*s.*: as the value of the coals did not appear on the pleadings, the Court observed that they could not say that the toll was excessive.²

*Kingston-upon-Hull Dock Co. v. La Marche*³ was an action of *indebitatus assumpsit* for wharfage, with the usual money counts. Plea—the general issue. The facts disclosed were that, by an Act of Parliament, certain persons were incorporated as the Hull Dock Company;

¹ *Serjeant v. Read*, 2 Stra. 1228; 359; Carth. 357.
¹ Wils. 91.

² *Vinkensterne v. Ebdon*, 1 Lord Raym. 384; 1 Salk. 238; 5 Mod. p. 126.
³ 8 B. & C. 42; see, too, *Gunning*,

that premises (before, the property of the Crown) were given to them for the purposes of the Act; and that they were authorized to make a dock, quays, wharfs, &c. which, it was enacted, should be vested in them for the purposes of the Act. Amongst other things it was provided that "All goods, &c. which should be *landed or discharged* upon any of the quays or wharfs which should be erected by virtue of the Act, should be liable to pay, and should be charged and chargeable with the like rates of wharfage and payments, as were usually taken or received for any goods, &c. *loaded or discharged* upon any quays or wharfs in the Port of London :"—Held, that, as the premises were only vested in the Company for the purposes of the Act, they had *no common law right* to a compensation for the use of them; and that the statute did not give them any right to claim wharfage for goods *shipped off* from their quays: Lord Tenterden, C. J., who delivered the judgment of the Court, saying: "Two points were made on behalf of the plaintiffs in this case—first, that they, as owners of the wharf, were at common law entitled to remuneration for the use of the wharf; and *secondly*, that they had such right upon the words of the statute. Our opinion is against them on both points. On the first we think that, under the statute in question, the plaintiffs cannot claim anything that is not expressly given."¹

The class of tolls now to be treated of, as well as those payable on canals, which it is proposed to consider in the next section, are levied almost entirely by the authority of particular statutes; and all the decisions in both cases turn almost entirely on the construction of these special Acts. It will be therefore convenient to notice here two general

Tolls for harbours, lighthouses, docks and piers are statutory tolls.

¹ Cf. as claims for wharfage, *Haspurt v. Wills* (1 Mod. 47; S. C., 1 Vent. 71; S. C., 1 Sid. 54, nom. *Heshod v. Wills*, S. C., 2 Keb. 624, 665), and *Colton v. Smith* (1 Cowp. 47), both of which see *ante*, note, p. 549.

principles which seem to apply in all such cases, before proceeding to consider them in detail.

Exemption of
the Crown
from toll.

It is to be observed, firstly, that the prerogatives of the Crown cannot be affected except by express legislative enactment—a rule which is very clearly explained by Cockburn, C. J., in *The Mayor of Weymouth v. Nugent*,¹ with express reference to tolls.

Meaning of
the legisla-
ture to tax
the subject
must be
clearly ex-
pressed where
a burthen is
imposed.

The other principle to be noted may be best stated in the words of Lord Brougham in *Stockton and Darlington Railway v. Barrett*.² “It must be observed,” said his lordship, “that, *in dubio*, you are always to lean against the construction which imposes a burthen on the subject. “The meaning of the Legislature to tax him must be clear. It was so held in *The Hull Dock Company v. Browne*,³ which both parties in this case relied on, “though for different purposes; and which the plaintiffs “in error especially cited in support of the argument for “them. The like law was laid down by the Court of “King’s Bench in the case of a company claiming against “the public. *Gildart v. Gladstone*⁴ and other cases entirely “concur in the same reasonable view. The Court there “said in effect, Here is a company which gets an Act of “Parliament to tax the subject; it is incumbent upon “that company to do two things:—to take care that the “Act of Parliament is made clear and undoubtful, es- “pecially upon those clauses by which the company seeks “to impose a burden upon the public; and if companies “do not choose to take the trouble to do that, let them “abide by the consequences; they will not be able to levy “the duty. But here the question is of an exemption or

¹ 11 L. T., N. S. 672. See the judgment of Cockburn, C. J.; and cf. as to vessels employed in the service of the Crown, *Master of Trinity House v. Clark*, 4 M. & S. 288; see Woolrych, p. 304; *Fallego v. Wheeler*, Camp. 143; and *R. v. Jones*, 8 East, 451; *Trinity Corporation v. Staples*, 2 Ch. Rep. 689; *Smithell v. Blythe*, 1 B. &

Adol. 509; see Woolrych, p. 304; *Hamilton v. Stow*, 5 B. & A. 649; see Woolrych, p. 305; *Gunning*, p. 121.

² 11 C. & F. 590; 8 Scott, N. R. 641.

³ 1 B. & Ad. 43.

⁴ 11 East, 675; 12 East, 439; 2 Taunt, 97.

“restriction of the duty imposed. The Article in question
 “restricts the duty on exported coal to a halfpenny,
 “being $3\frac{1}{2}d.$ less than the second Article allows, making it
 “one-eighth part only of the tax: therefore we are,
 “according to the books cited, to lean in favour of the
 “construction, where it is doubtful, which, by extending
 “the limits of the port, enlarges the bounds of the exemp-
 “tion from the special taxation.”¹

We will now note a few of the decisions on Acts relating to lighthouses and harbours and docks.

It is well known that the beaconage and lighthouse Lighthouses.
 duties demanded by the corporation of the Trinity House
 are authorized by Parliament by reason of their evident
 utility,² but there must be some benefit accruing to the
 vessels chargeable for the dues so demanded.³

Hence, it has been held that British ships in passing by
 the Eddystone and other lighthouses in the Channel, not
 touching at any place in Great Britain or Ireland, are not
 liable to pay the lighthouse duties to the Trinity House,⁴
 and where a harbour Act⁵ gave the trustees a duty of six-
 pence per ton on every British or foreign ship sailing from,
 to, or by Ramsgate, or coming into the harbour there;
 the Court were of opinion that such duty was not payable
 by a vessel passing on the north-east side of the Goodwin
 Sands, and not through the Downs;⁶ nor by a foreign ship
 sailing from a place in Norway for Falmouth, and which,
 in the course of her voyage, sailed four leagues south-east
 of the Goodwin Sands, and did not put into the Downs,
 nor sail within sight of Ramsgate.⁷

¹ Cf. as to this principle, Tindal, C. J., in *Barrett v. Stockton and Darlington Railway* (2 Scott, N. R. 337; 2 M. & G. 134), where, in addition to *Gildart v. Gladstone, Hull Dock Co. v. Browne* (2 B. & Ad. 58), *Leeds and Liverpool Canal v. Hustler* (1 B. & C. 424; 2 D. & R. 556), and *Britain v. Cromford Canal Co.* (3 B. & Ald. 140), were cited in support of it. See, too, *Casher v. Holmes*, 2 B. & Ad. 592.

² *Trinity House v. Sorsbie*, 3 T. R. 768, note (a).

³ *Ib.*; *Matson v. Scobell*, 4 Burr. 2258; *Poole or Pole v. Johnson*, 2 Sir W. Bl. 764.

⁴ *Trinity House v. Sorsbie*, 3 T. R. 768; see Woolrych, p. 304.

⁵ 22 Geo. II. c. 40.

⁶ *Matson v. Scobell*, 4 Burr. 2258.

⁷ *Poole or Pole v. Johnson*, 2 Sir W. Bl. 764.

Exemptions
of the Crown
and its ser-
vants.

It has been noted above that the Crown is, unless expressly charged, exempt from payment of tolls. Thus, the exception of her Majesty's ships of war in an Act empowering the promoters of a lighthouse to take tolls was held not to warrant the inference that other ships belonging to the Crown were chargeable. The exception might be *ex majori cautela*.¹

Where the owner of a ship chartered it to the commissioners of transport service on behalf of the Crown, it was considered that a temporary ownership in the vessel thereby passed to the Crown, and that he consequently, during the voyages made in the course of such employment, was not considered as owner within the charters granted to the Trinity House which imposed lighthouse duties and duties for buoyage and beaconage on the owners or masters of ships.² Similarly a vessel hired by the Postmaster-General to carry the mails and government despatches to and from Dover to Calais, &c., the master of which was permitted to carry passengers and their luggage, and bullion upon freight, was held to be a vessel within the exception of an Act imposing a tonnage duty on vessels coming into the harbour of Dover, but which contained an exception in favour of all vessels employed on her Majesty's service.³ Abbott, C. J., said,¹ "The statute contains two exemptions,—1st, all vessels belonging to his Majesty; and, 2nd, all vessels employed in his service; the case of *Rex v. Jones*⁴ is a good authority to show that the vessel in this case belonged to the captain and not to the king; but it does not apply to the latter branch of exemption. It is impossible to say that this vessel was not employed in his Majesty's service when it came into Dover. The captain is appointed by the Post-

¹ *Smithett v. Blythe*, 1 B. & Adol. 509.

² *Master of the Trinity House v. Clark*, 4 M. & S. 288; cf. *Vallego v. Wheeler*, Cowp. 143; *R. v. Jones*, 8 East, 451; *Trinity House v. Staples*, 2 Chit. 689.

³ *Hamilton v. Stow*, 5 B. & A. 649; see, too, Woolrych, p. 305; Gunning, p. 121.

⁴ 8 East, 451,—cited for the defendant, the harbour master of Dover.

“master-General. The appointment of the captain states
 “the vessel to be employed in his Majesty’s service, and
 “he is directed to obey such orders as he shall from time
 “to time receive from the agents of the government.
 “This latter stipulation is quite inconsistent with the right
 “of employment being in the captain. Whatever is taken
 “on board the vessel besides the mails and despatches is
 “by the express permission of government. I am clearly
 “of opinion that this vessel was at the time of committing
 “the trespass in the service of his Majesty.”

All the cases regarding the rights and duties of harbour trustees will be found to depend, like the above, on the construction of particular Acts.

Where an Act for keeping in repair a harbour imposed Piers and
 certain duties on goods exported and imported, and under harbours.
 the head “metals,” certain specified duties were imposed
 on copper, brass, pewter, and tin, and on all other metals
 not enumerated in the schedule of the Act, for every 10*l.*
 value 10*d.*; it was held, that the latter words did not
 include gold and silver; and, therefore, that the commis-
 sioners were not entitled to demand for specie or bullion
 10*d.* for every 10*l.* value.¹

In the case of *Jones v. Phillips and others*,² certain harbour
 commissioners under a local Act of Parliament³ were
 authorized to charge a sum not “exceeding 1*d.* for every
 “ton or less quantity than a ton, and for every package
 “and parcel of goods, wares, merchandize, &c. exported or
 “imported over the bars of certain rivers;” and the ques-
 tion for the opinion of the Court was whether the commis-
 sioners could legally claim 1*d. per box*, harbour dues on
 certain exported boxes of tin plates, which formed part of
 and composed one entire shipment in one vessel, to the same
 consignee, at a uniform rate of freight on the quantity of
 tons weight; or whether the sum was to be charged for
 at the rate of 1*d. per ton*:—Held, that they were entitled

¹ *Casher v. Holmes*, 2 B. & Ad.
 592.

² 7 Exch. 85; 21 L. J., Exch. 7.
³ 55 Geo. III. c. clxxxiii.

to charge the former rate, and were not bound to charge 1*d.* per ton weight.

The words "shipped for exportation" are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense; that is, a carrying out of a port.¹

A Railway Act empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, "not exceeding the sum of 4*d.* per ton per mile." It then went on thus: "And for all coal which shall be shipped on board of any vessel, &c. in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of $\frac{1}{2}$ *d.* per ton per mile." Held, that with respect to coals shipped for exportation, this was not a cumulative but a substituted toll.

Held, also, that the words "the port of Stockton-upon-Tees aforesaid" meant the whole port of that name, and was not restricted to the port of the town of Stockton-upon-Tees; and that there was not such an ambiguity in the enacting part of the Act as to compel a reference to the preamble of it; and that the word "aforesaid" did not limit the expression to the port of the town as described in that preamble.

Another Act, passed on the same subject, after reciting the former Act, and also reciting that the proprietors had been at great expense in forming inclined planes on the line of railway, authorized them to demand "for all articles, &c. for which a tonnage is hereinbefore directed to be paid, which shall pass any inclined plane upon the said railway, such sum as the said proprietors shall

¹ *Stockton and Darlington Railway v. Barrett*, 11 C. & F. 590; 8 Scott, N. R. 641; and cf. on this point the remarks of Tindal, C.J., in *Barrett v. Stockton and Darlington Railway* (2 Scott, N. R. 337; 2 M. & G. 134), who there comments on *Gildart v. Gladstone* (1 East,

685), per Lord Ellenborough; *Kingston-on-Hull Dock Co. v. Broune* (2 B. & Ad. 58), per Lord Tenterden; Bayley, J., in *Leeds and Liverpool Canal v. Hustler* (1 B. & C. 424; 2 D. & R. 556); and Holroyd, J., in *Britain v. Cromford Canal* (3 B. & Ald. 140).

“appoint, not exceeding the sum of 1s. per ton:”—Held, that this was a cumulative charge.

It was recited by stat. 48 *Geo. III. c. civ.*, that the harbour of *Berwick-upon-Tweed*¹ had gone to decay for want of funds, and that it was expedient that the duties on goods should be fixed, and vested in commissioners, to be by them applied for the purposes of the Act, and commissioners were appointed for carrying the Act into execution, and empowered to rebuild the pier of the harbour, to deepen the harbour, to remove obstacles, to set up within the harbour jetties, posts, &c. for carrying on the navigation, and rendering the harbour more commodious, and for other works and conveniences, as they should think fit; and to make and repair quays, wharfs, and docks, for the better accommodation of shipping. Duties, to be paid to the commissioners, were imposed, according to a schedule, on goods “imported into or exported “from the said harbour.” It was enacted that the said harbour should be deemed to extend down the Tweed and its shores, from the bridge over the Tweed to the sea.

A vessel brought goods from the sea into the harbour, made some use of the posts erected therein by the commissioners, and passed, without otherwise using the harbour, under the bridge, up the river, and landed the goods at a point above the bridge within the flow of the tide, where there was no harbour:—Held (on a special case, which empowered the Court to draw inferences of fact), that the goods were not imported into the harbour, and therefore not liable to duty, although the schedule of duties spoke of “goods imported and shifted to another “vessel for exportation and not landed.”²

In *Ribble Navigation Company v. Hargreaves*,³ which was an action brought to recover from the defendant the amount of certain tolls imposed by the 71st sect. of the

¹ *Wilson v. Robertson*, 4 El. & Bl. 923; 1 Jur., N. S. 755.

bell, C. J., p. 931.

³ 17 C. B. 385; 25 L. J., C. P.

² See remarks of Lord Camp- 97.

Ribble Navigation Act,¹ in respect of goods "carried or conveyed in or upon the river Ribble," for every time of passing "the Ribble Sea Line" and "the Ribble Inner Line" respectively. The point raised was the meaning of the terms "owner," "shipper" as governed by sects. 3, 42 and 45 of *The Harbours, Docks and Piers Clauses Act*, 1847 (10 & 11 *Vict. c. 27*), which is incorporated with the special Act, and it was held, that one who delivers goods on board a vessel provided by the purchaser is not the "owner" or the "shipper" within the statutes, so as to be liable to an action for the tolls imposed by the 71st sect. of the special Act.

Where² the defendants were empowered by a local Act to levy tolls on all goods *landed* within their harbour, and in pursuance of a practice which had continued for many years, stones brought along the coast into the harbour were shot from the plaintiff's boat on to the shore, below high water mark, and remained on the spot where they were deposited till they were shipped for exportation from the harbour:—It was held that the stones were not *landed* within the meaning of the Act.

Dock dues dependent entirely on Act of Parliament creating the dock.

Mr. Gunning, in his work on *Tolls*,³ points out that the right to dock dues depends in every case upon the particular Act of Parliament under which the docks are erected, and is quite distinct from the question of ports and port dues, and that the property in a port and that in the docks situated within the town which is the head of the port, is frequently in different persons, and he cites Liverpool and London as instances.

The powers and rights of owners of docks are usually expressed in the Act of Parliament under which they are erected, and when that is the case they cannot be exceeded.³ Where the Act is silent on this point the public have a right to enjoy the privilege of using the docks

¹ 16 & 17 *Vict. c. clxx.*

² *Harvey v. Mayor and Corporation of Lyme Regis*, L. R., 4 *Exch.*

260; see remarks of Bramwell, B., as to the term "*landed*."

³ Page 129.

upon "reasonable terms," and the owner cannot impose what tolls or duties he pleases on them.¹

The question as to the reasonableness of a particular toll is for the Court and not for the jury to decide.² The jury are to give their verdict according to the invariable and reasonable custom, the judge alone can decide whether such tolls are reasonable or not.³

The reasonableness of a toll is for the Court and not the jury to decide.

The term "port" is used in its popular sense when the limits of a place liable to the burden of dock duties requires a legal construction.⁴ Thus Goole, which is without the port of Hull, was held not liable to such duties, although Goole and Hull might be considered as a district for the purposes of revenue. But a vessel proceeding with a cargo taken in at Goole to Hull is liable for tonnage.⁵

Meaning of term "port."

Dock duties, when assigned by virtue of an Act of Parliament, are not mere chattels but charges upon the docks; and it was accordingly held that an auctioneer could not be called upon to pay the duty upon them when viewed in any other light than as interests in land.⁶

Assignment of dock dues.

It would be out of place here to enumerate all the various decisions on special Acts relating to docks. We shall, therefore, merely select from the cases on the West India Dock Acts and the Liverpool Dock Acts such as seem to embody important principles.

The case of *Allnutt v. Inglis* has already been alluded to⁷ as turning on points relating to wharfage payable to the London Dock Company; *Harden v. Smith* and *Shræder v. Smith* were important cases with regard to the West India Dock Acts.⁸

London Docks. Decisions as to dues.

¹ *Allnutt v. Inglis*, 12 East, 527.

² 2 Inst. 222; *Vinkensterne v. Ebdon*, 1 Lord Raym. 384; 1 Salk. 248; 5 Mod. 366; *Carth. 357*; *Corporation of Stamford v. Paulet*, 1 C. & J. 57; *S. C.* in error, 1 C. & J. 400.

³ *Lowden v. Hierons*, Holt, N. P. C. 647; 2 B. Moo. 102; 2 Inst. 222; *Wright v. Brewster*, K. B., November, 1832.

⁴ *Kingston-upon-Hull Dock Co. v. Browne*, 2 B. & Adol. 43; see Woolrych, p. 318; and Gunning, p. 112, note 2.

⁵ *Hull Dock Co. v. Priestley*, S. C., 1 Nev. & M. 85; see Woolrych, note (c), p. 318.

⁶ *Rex v. Winstanley*, 8 Price, 180.

⁷ 2 East, 527; see *ante*, p. 566.

⁸ 8 East, 16.

These were actions for money had and received, money paid, &c., which were brought against the defendant as treasurer of the West India Dock Company¹ to recover back certain sums which had been paid by the plaintiff (who had purchased certain hogsheads of sugar before then imported from the West Indies into the port of London, which had continued all the time in the company's warehouses, and for which all the importation rates and duties had been satisfied), to the officers of the company for wharfage, and for shipping into lighters, sent into the docks by the plaintiffs for that purpose, the same hogsheads of sugar, part for home consumption, part for exportation. The company, on the one hand, contended, that they were only bound, in consideration of the rates and duties received upon importation of the goods, to deliver the same free of further charge from their warehouses by inland carriage; the plaintiffs, on the other hand, maintained, that they had a right, for the same compensation, to receive the goods from the warehouses across the quays, and by means of the cranes thereon into their lighters and so remove them by water carriage, as well as to receive and remove them immediately from the company's warehouses by land carriage.

The West India Dock Company is incorporated by Act of Parliament, and sect. 137 of 39 *Geo.* 3, *c.* 69, gives the company certain rates and duties for all goods imported from the West Indies which shall be landed, &c. from on board any ship entering into and using the dock; which rates are directed to be "accepted for the use of the docks
" and the quays, wharfs and cranes and other machines
" belonging thereto, and the land waiter's fees on account
" of such goods, after being unshipped, and all charges
" and expenses of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may

¹ Cf. *Blackett v. Smith*, 11 East, 533; and see Woolrych, p. 317, which was an action for wharfage

and portorage against the same party.

“ want after being unshipped, and all rent for warehouse room for twelve weeks, *and all charges of delivering the same from the said warehouses.*” The Court held that the latter words include a delivery of the goods into lighters in the dock, as well as any immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses, although for the purposes of such delivery into *lighters* it be necessary to put the goods upon trucks in order to carry them across the quay, and afterwards crane them into the lighters. But it seems that if the owner require any work to be done upon the goods *ultra* the mere *transitus* of them from the warehouse to the lighters, the company are entitled to an extra compensation, to be settled by convention between the parties, as in other cases out of the Act.

*Blackett v. Smith*¹ was a decision on another part of the same section of this statute,² in which it was held, that the owner of a homeward-bound ship entering the West India Docks in so leaky a condition as to require immediate unloading and assistance, without waiting her turn to be unquayed and unloaded in rotation in the manner required by 39 *Geo. III. c. 69*, is bound to bear the extra expenses of labourers for pumping the ship after the crew are discharged, and for delivering the cargo into lighters in the outward dock or basin; also for cooeping previous to such delivery into lighters; the company having afterwards unladen the cargo out of such lighters upon the quays, in the import dock and performed the requisite cooeping, &c. upon such unloading, in the same manner as they would have done if the cargo had been delivered out of the ship itself in its proper time and place. Lord Ellenborough, C. J., in delivering judgment, remarked, “ The law requires ships of this description to go into the docks; and if they be in such a state when they arrive there that they cannot wait for their proper turn

¹ 12 East, 518; see *Gunning*, p. 133. ² 39 *Geo. III. c. 69*.

“ to unload, they must discharge their cargo at once, and
 “ if any inconvenience or loss ensue to the owners from not
 “ being able to do this in the manner prescribed by the
 “ Acts, it must be attributed partly to regulations of the
 “ Acts and partly to the leaky condition of the ship itself.
 “ It is a grievance, however, which the Acts throw upon
 “ the owners, and not upon the company. This is one of
 “ the fairest cases of defence for the company which has
 “ come before us upon the construction of these Acts. The
 “ rate of 6s. 8d. per ton for ships required to be paid by the
 “ owners to the company for the charges and expenses of
 “ navigating, unmooring, removing, and management of
 “ such ships in the docks, and for the unloading their
 “ cargoes, &c. must be intended of the ordinary charges
 “ and expenses of navigating, &c. for such ships as are in
 “ a reasonably navigable, moorable, unmoorable, remove-
 “ able, and manageable condition, and capable of comply-
 “ ing with the requisitions of the Acts; and it could
 “ never have been intended by the legislature that the
 “ company should be obliged, in consideration of that
 “ rate, to take upon themselves all the extra expenses
 “ which ships, in the state of infirmity in which this ship
 “ presented itself to them, might require to enable her to
 “ discharge her cargo.”

Liverpool
 Docks.
 Decisions as
 to dues.

The case of *Gildart v. Gladstone*,¹ which turned on the construction of certain statutes incorporating and regulating the Liverpool Docks, is one of importance, in which the question as to what constitutes the same voyage out and home was discussed.

By the Liverpool Dock Acts of 8 *Anne* and 2 *Geo. III.*, certain tonnage duties are payable to the dock company on all vessels sailing *with cargoes outwards or inwards*, so as no ship shall be liable to pay more than once *for the same voyage out and home*, if there be either an

¹ In error, 11 East, 675; see too, Gunning, p. 135; 12 East, 439; 2 Taunt. 97; and cf. Lord

Brougham's remarks in *Stockton and Darlington Railway v. Barrett*, 11 C. & F. 590.

outward or an inward cargo on such voyage; but without making any advance if there should be both. Thus, a Liverpool ship carrying a cargo out to the West Indies, and bringing another home to Liverpool, is only liable to pay one duty, viz.—the duty *outwards*; and a foreign ship bringing a cargo to Liverpool, and carrying another out, is only liable to pay the duty *inwards*. But where a ship was built in another port, for an owner residing at Liverpool, where she was registered, and sailed to the West Indies without first coming to Liverpool, but brought her return cargo there as to her home; this was held to be one entire and distinct voyage within the meaning of the Acts, for which the duty *inwards* was payable, and did not privilege the ship from payment of the duties again, when next she sailed with another cargo upon her *outward* voyage to the *West Indies*, though, in fact, she only used the dock inwards on her first voyage; for the privilege of using the docks with an outward and inward cargo upon one payment of duty is confined to the *same voyage out and home*.

The same point was raised in another action in which the same parties were concerned,¹ where it was held that a voyage out from Liverpool with a cargo to Halifax in North America, where the ship delivered it, and took in another cargo there for Demerara in South America, and after delivering that returned to Liverpool with a cargo from Demerara, *was all the same voyage out and home* within the meaning of the Liverpool Dock Acts (8 Anne and 2 Geo. III.), and chargeable only with one tonnage rate for the use of the docks.²

Where, however, an Act provided that vessels trading *inwards* to the port of Liverpool should pay dock rates

¹ *Gildart v. Gladstone & Gladstone*, 2 Taunt. 97; *S. C.* in error, 12 East, 439.

² *Ib.*; cf. on this point, *Trustees of Liverpool Docks v. Gladstone and*

another, 5 M. & S. 328; see Gunning, p. 137; and *Kingston-upon-Hull Dock Co. v. Huntingdon*, 2 Chit. Rep. 597; see Woolrych, p. 315.

according to a fixed scale proportioned to the distance of the port from which they were trading, and that vessels arriving in ballast, but trading *outwards*, should pay in proportion to the distance of the port to which they were trading; it was held that a vessel that had discharged her cargo at a port in England, and taken on board ballast prior to sailing to Liverpool for the purpose of loading a cargo for the West Indies, and which took on board a bale of cotton and a few other articles, admittedly in order that she might pay dock rates as a vessel trading inwards from the port where she took on board such articles, and not as a vessel arriving in ballast, *was* a vessel arriving in ballast within the meaning of the Acts.¹

*Southampton
Dock Co. v.
Hill.*

The Southampton Dock Company are empowered by their Act, 6 *Will. IV. c. xxix*, s. 149, to charge for the landing of goods in their docks the several sums mentioned in the schedule thereto annexed, and for articles not therein particularized such sums as shall be equal to the sums affixed on goods, &c. "of a similar nature, "package, value, and quality" in the schedule. All the charges mentioned in the schedule were of small fixed sums—none being *ad valorem* except the charge for "sculptured marble:"—Held, that the company were not entitled to make an *ad valorem* charge for the landing of goods not enumerated, or at all approaching in "nature, "value, and quality" to those enumerated in the schedule.²

*Tyne Keelmen
v. Davison.*

By a local Act,³ a toll or tax of $\frac{1}{4}d.$ per chaldron is imposed upon the owners or lessees of "any collieries or "coal mines near the river Tyne," for every chaldron of coals sold or delivered by them to be exported from or out of the said river, and which shall be so exported; such toll "to be collected or received at the offices or places "respectively where the contracts for the sale or delivery

¹ *De Gartheig v. Mersey Docks and Harbour Board*, 37 L. T., N. S. 411—C. P. D.

² *Southampton Dock Co. v. Hill*, 14 C. B. 243; 11 W. R. 646.

³ 1 Geo. IV. c. liii.

“ of such coals are usually made,” in aid of the Tyne Keelmen’s Charitable Fund, created by 28 *Geo. III. c. 59*. Since the formation of railways and docks, the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharf or quay by railways and shipped direct:—Held, that coals shipped on the Tyne from collieries “near” to the river were still liable to the payment; and that a colliery situate ten miles from the Tyne is “near the said “river Tyne” within the meaning of the Act. Held, also, that coals brought for shipment to the Tyne by a public railway from collieries which, before the formation of railways, had always shipped their coals on the river Wear, to which they had been conveyed by private tramways from the collieries, were equally liable to the keelmen’s dues.¹

The Commercial Dock Company was created by 50 *Geo. III. c. 207* (local and personal declared public). 51 *Geo. III. c. 66* (local and personal declared public), empowered them to distrain and sell ships for non-payment of rates and charges due for dockage of ships, receiving, warehousing, and storing goods; and if any consignor or consignee of any goods or merchandize neglects or refuses to pay rates or charges, the company may detain goods, &c. until paid, and, if removed before payment, may distrain any goods of the owner, consignor, or consignee, and detain and sell same, or may prosecute actions for those duties. 10 & 11 *Vict. c. 27, s. 45*, contains similar provisions, which by 14 & 15 *Vict. c. xliii*, are extended to the Commercial Dock Company. The plaintiff having purchased from the owners some timber stored at the Commercial Docks, and which was entered in the books of the company in the name of a broker, the com-

*Dresser v.
Bosanquet.*

¹ *Society of Guardians of Keelmen of the Tyne v. Davison*, 16 C. B., N. S. 612; *Society of Guardians of*

Keelmen of the Tyne v. Elliott, 16 C. B., N. S. 622.

pany refused to transfer the timber into the name of the plaintiff, on the ground that the broker was indebted to them for rent and charges in respect of other goods standing in his name in the books of the company, although the plaintiff tendered to them the specific rent and charges due in respect of the goods purchased by him:—Held, 1st, That the above statutes conferred on the company no right to do so; 2nd, That the company could not rely on any general lien to that extent by the common law, supposing that such existed, as the statutes must be taken to displace such right.¹

Tolls on
canals.

“Those who seek to impose a burthen upon the public “should take care that their claim rests upon plain and “unambiguous language,” said Bayley, J., in *Leeds and Liverpool Canal v. Hustler*.² This principle, which has been confirmed by several important decisions,³ applies very fully to canal tolls; for where a canal is made by Act of Parliament, the right to take tolls is derived entirely from the Act, and is to be considered as a bargain between the owner and the public; and where there is any ambiguity, it must be construed against the canal proprietors, who can claim nothing which is not given them by the Act.⁴

Right to de-
rived entirely
from the Act
of Parliament
creating.

No obliga-
tion on com-
panies to
impose equal
tolls.

There appears to be no obligation on a company, however, to impose an equal toll on all persons, provided they keep within the amount appointed by their Acts,⁵ though on grounds of public policy such an equality may be desirable for the public, who have an interest that the

¹ *Dresser v. Bosanquet*, 4 B. & S. 460; 34 L. J., Q. B. 374.

² 1 B. & C. 424; 2 D. & R. 556.

³ *Britain v. Cromford Canal*, 3 B. & Ald. 140; *Hull Dock Co. v. Browne*, 2 B. & Ad. 58; *Gildart v. Gladstone*, 1 East, 685; *Barrett v. Stockton and Darlington Railway*, 2 Scott, N. R. 337; 2 M. & G. 134;

Stockton and Darlington Railway v. Barrett, 11 C. & F. 590; 8 Scott, N. R. 641.

⁴ *Stourbridge Canal v. Wheeley*, 2 B. & A. 793; see, too, *Woolrych*, p. 312.

⁵ *Cockburn, C. J.*, in *Hungerford Market Co. v. City Steamboat Co.*, 7 Jur., N. S. 67; see *ante*, p. 544.

canal should be kept up, and the tolls consequently to be kept as equal as possible.¹

At common law tolls only become due at the end of a voyage, since the contract is not completed till the port of delivery is reached, and though this may be altered by legislative enactments so as to make tolls payable at intermediate distances, they must be demanded according to the rules of law respecting the carriage of goods from one place to another.² It is in accordance with these facts that, as a general rule, the principle seems to be that Acts imposing a toll should be construed as strictly as possible,³ since, as has been said by a learned judge, "though such construction may be perhaps inconvenient, the Court cannot make a new toll."⁴

"No general rules or principles," says Gunning,⁵ "can be laid down applicable to canals in general;" and this is evident when it is remembered that in the case of canals, as in that of dock companies and harbours, each is dependent upon a particular act, and therefore that, since, as is pointed out by Woolrych,⁶ "the cases which have arisen were decided upon the construction of the several statutes relating to each particular subject, the general principle is rather to be gathered from the effect which the Courts have given to the enactments themselves, than from the decisions."

No general rules applicable to.

We shall, therefore, consider such cases as seem to be most important.

In the case of *The Stourbridge Canal v. Wheely*,⁷ the plaintiffs made a canal on two levels, which were connected by locks. On the upper level there was no lock.

¹ *Lees v. Manchester and Aston Canal*, 11 East, 645.

² Buller, J., in *Rex v. Page*, 4 T. R. 549; cf. *Rex v. Aire and Calder Navigation*, 2 T. R. 660.

³ Woolrych, p. 306.

⁴ *Ib.*; Bayley, J., in *Britain v. Cromford Canal*, 3 B. & A. 140.

⁵ Page 102; cf. Woolrych, p. 306.

⁶ Woolrych, p. 306. A canal Act is not necessarily a public Act; 1 Moo. & Malk. 421; *Brett v. Beales*, 10 B. & C. 508.

⁷ 2 B. & A. 793.

By their Act all persons were to be at liberty to navigate the canal on payment of certain rates, and the company were authorized to take certain tolls for certain goods which might pass through one or more of the locks, while owners of adjoining lands might use pleasure boats not carrying goods, so long as they did not pass through any locks without paying dues :—Held, that the Act gave no right to demand tolls for boats navigating the level of the canal where there were no locks.

36 *Geo. III. c. 67*, empowered certain persons to make the Tamar navigable for boats, barges, and other vessels, with proper cuts and deviations from the sides thereof, from M. Quay to Boat Pool; and thence to make a canal, and to make and maintain a collateral cut or canal navigable for boats, &c. from the said canal to R. mill, and authorized them, in consideration of expenses, to take from time to time tolls at so much per ton per mile for goods, &c. “carried upon the said navigation, canal, cut, or any of “them.” They had expended considerable sums in clearing and deepening the river for the purpose of making it navigable to a point about one-quarter mile of Boat Pool, but had not made the canal or collateral cut :—Held, that they were entitled to recover tolls for carriage of goods over the part of the river made navigable.¹

Where a canal company were authorized by their Acts to make a canal, and do other things necessary for the making, improving, and using it; but were forbidden to make more than 8 per cent profit, and were to lay their accounts annually before justices :—It was held that they were authorized by their Act to deepen and widen the canal after it had been completed (that being beneficial to the public); and that the widening and deepening being done at the request of those using the canal, the charge for so doing was a charge attending the using of the canal.²

¹ *Tamar Navigation v. Wagstaffe*,
4 B. & S. 288.

² *Rez v. Glamorganshire*, 7 B. &
C. 722.

In another case¹ under the same Acts, it was shown that the company were empowered to "make all such "other works as they shall think necessary or proper "for effecting, completing, maintaining, improving, and "using the said canal and other works," and that they were required to lay before sessions an annual account of the tolls collected, and of the charge of supporting the navigation. The sessions were authorized under certain circumstances to reduce the canal rates. After the completion of the canal, and after first account of the capital expended in the undertaking had been delivered upon which the dividends were to be calculated, the company deemed it necessary to erect a reservoir and steam engines. When applying to have an annual account allowed the company included the expenses of these new works, but certain freighters on the canal having objected to the items, the justices disallowed the sums in question, although it appeared in evidence before them that the works had been erected for the support and improvement of the original line of road, and for the better supplying it with water in dry seasons. This order being brought before the Court of King's Bench by *certiorari*, was quashed, it being held that, though the works were new in specie, yet, being for the maintenance of the old canal and works, they were justifiably made. Had they been colourably executed for the benefit of individuals, the charges might and would have been repudiated; but this was not so, and the sessions having proceeded on a wrong principle, their order could not stand.

It has been held that no toll was imposed on empty boats by the provision in a canal Act, that no boats navigating thereon of less burthen than *twenty tons*, or which should not have a loading of *twenty tons* on board, should pass through any of the locks unless

¹ *Rex v. Glamorganshire*, 12 East, 156; see Woolrych, p. 310.

on payment of a tonnage equal to a boat of *twenty tons*.¹

A canal company was empowered to take tolls on all goods excepting manures, and it was also provided that no boat or vessel should pass through any lock unless such vessel should pay duty equal to what would be paid by a vessel loaded with thirty tons:—Held, that this only applied to toll-paying goods, and therefore that a vessel laden with manure was entitled to navigate the canal, and pass through the locks at any time without payment of any toll whatever.²

An Act of Parliament provided that the Monmouthshire Canal Company were not to take any higher toll for the time being than the Brecknock Canal. The latter by general resolution lowered their tolls:—Held, that the company could not question collaterally the validity of such resolution, but were bound by it. Abbott, C. J., saying, “If, indeed, without any colour of authority, the rates of the Brecknock Canal had been lowered the case would have been different.”³

Where a canal Act imposed a toll on “coal, lime, “timber, bricks, stone, and all other goods, wares, or “merchandise whatsoever,” gravel and materials for turnpike roads were held liable to toll.⁴

Lees v. Manchester and Ashton Canal Co.,⁵ has been already referred to with regard to the alteration of tolls.⁶ There the defendants, being authorized by their Act to take such tolls as were fixed at a general assembly (at the rate of not more than 1*d.* per ton per mile), and also to reduce rates at a general assembly, though not without

¹ *Leeds and Liverpool Canal v. Hustler*, 1 B. & C. 424; 2 D. & R. 556. Since this decision, 59 Geo. III. c. 10, has imposed a simple lockage duty of 5*s.* upon empty boats; note (a), 1 B. & C. 424.

² *Grantham Canal Co. v. Hall*, 14 M. & W. 880; cf. *Hall v. Grantham*

Canal Co., 13 M. & W. 114; 13 L. J., Exch. 203.

³ *Monmouthshire Canal v. Kendal*, 4 B. & Ald. 453.

⁴ *Coulton v. Ambler*, 3 Rail. Cas. 724.

⁵ 11 East, 645.

⁶ See *ante*, pp. 480, 543.

the consent of the major part of the proprietors, made a contract with the plaintiffs (but not at a general meeting), whereby, in consideration of their making a cut from their collieries to carry water to the canal, and conveying the same to the company, the latter were to permit them to convey coals at a less rate.

It was held that this contract was illegal and void, since it was a speculation by which the company might gain more or less than the legislature intended, and which would extend the company's power to purchase land beyond the limits in the Act, and enable them to raise more capital. Also, that it was void because the tolls could only be reduced at a general meeting.

Lord Ellenborough, who delivered judgment, said, *inter alia*, "The public have an interest that the canal should be kept up, and whatever has a tendency to bring it into hazard is an encroachment upon their right in it. They have also an interest that the tolls shall be equal upon all; for if any are favoured the inducement to the company to reduce the tolls generally below the statute rate is diminished. But as it is sufficient in this case to say that this bargain is not binding upon the company of proprietors, inasmuch as it abridges their rights in a way the statutes do not warrant, it is unnecessary to give an opinion whether it so interferes with the rights of the public as to be on that ground also void."

Cockburn, C. J., commenting on these remarks in *Hungerford Market Co. v. City Steamboat Co.*,¹ said, "The observations of Lord Ellenborough go no further than to show that on grounds of public policy it may be desirable that such an obligation (*i. e.*, not to lower the tolls,) should attach to the power of a public company to take toll; yet authority would certainly seem to be required to establish a proposition directly at variance

¹ 17 Jur., N. S. 67; 30 L. J., Q. B. 25; 3 El. & Bl. 365; 3 L. T., N. S. 732.

“ with the well-known axiom, that every one is at liberty
 “ to renounce a right established in his favour.”

By sect. 103 of 3 *Geo. IV. c. 126*, the proprietors or trustees of any canal, railway, or tramroad, on which any materials for the repair of turnpike roads may be conveyed, may reduce the tolls imposed by any Act of Parliament on the carriage of such materials, and appoint lower tolls, and reduced tolls may be collected and recovered in the same manner as the original tolls.¹ Also, although an Act should authorize the reduction of tolls, and provide for the appropriation of any surplus of rates, commissioners may again raise the rates if it should become necessary.²

The case of *The Medway Navigation v. Brook*,³ turned upon the construction of a private Act relating to the navigation of the Medway; by sect. 23 of which the plaintiffs were empowered to take from persons conveying goods upon the said river between Maidstone and Forest Row, or any part thereof (which all person or persons should and might lawfully do), certain rates and duties for lockage and riverage, which were not to exceed a given limit, and which, by sect. 28, the plaintiffs were from time to time to publicly fix up.

By sect. 31, nothing in the Act is to be construed to extend the plaintiffs' authority to the execution of any works below Mr. Edmond's wharf in Maidstone; and

By sect. 38, any action, suit, or information for anything done in pursuance of this Act, or in relation to the premises, shall be commenced within three months after the facts committed.

Maidstone extends along the river upwards, about three furlongs from Mr. Edmond's wharf to the College lock constructed by the plaintiffs, Maidstone Bridge being

¹ See Woolrych, p. 312.

² *Ib.*; *Good v. Penny*, 9 Mees. & W. 687. See also 8 & 9 Vict.

v. 28, *ante*, p. 480.

³ 33 L. T., N. S. 843.

between the two. Plaintiffs, besides other works on the river, had scoured a shoal between the said bridge and Mr. Edmond's wharf, and on their annual survey they always disembarked at that wharf.

In 1874, the plaintiffs having amended their toll list so as to charge for the first time tolls proportioned to a fractional part of a mile traversed, the defendant who was owner of oil mills situate on the Medway less than a mile above the College Lock, but more than a mile above Mr. Edmond's wharf, refused to pay any toll upon barges coming up the river to his mills.

Held, that the plaintiffs were entitled to charge tolls proportioned to a fractional part of a mile traversed since the amendment of their list, without reference to the three months' limitation provided by sect. 38.

In *Fisher v. Lee*,¹ it was held, that blocks cut with wedges from the quarry, and, therefore, reduced to certain dimensions according to order, and squared with a pickaxe, to be used as railway sleepers, each being after such preparation worth ninepence more than unwrought stone of the same weight,—were liable to the toll as stones only, and not as merchandize under a Navigation Act,² which imposed a toll on “every ton of butter or other goods, “wares, merchandizes, and commodities,” and a lower toll on “every ton of coals, cinders, lime, and limestone, “stone, gravel, and manure.”

*Tame v. Grand Junction Canal Co.*³ also turned on the construction of certain canal Acts.

By 33 *Geo. III. c. lxxx*, the Grand Junction Canal Company were empowered to take tolls for the passage of manure between Braunston and Brentford. By sect. 97, persons occupying lands through which the canal passed might carry manure without payment. By 34 *Geo. III.*

¹ 12 A. & E. 622; 4 P. & D. 447.

³ 11 Exch. 786; 26 L. J., Exch. 222.

² 7 *Geo. III. c. 96*.

c. xxiv, for making a cut to Buckingham, the powers and authorities mentioned in the former Act were to be exercised by the company and by the owners of land on the new cut as if re-enacted, and the like exemptions were to be allowed. By 35 *Geo. III. c. xliii*, reciting the first-mentioned Act, the company were empowered to make a cut to Paddington; and the several powers, authorities, matters, and things in the recited Act contained, except the rates, were to be used and exercised *by the company*, and applied for making the cut and for ascertaining tolls, and in all respects as if re-enacted, and as if the cut had been part of the works authorized to be made by the first Act.

By 35 *Geo. III. c. lxxxv*, for making a cut from Watford to St. Albans, reciting the before-mentioned Acts, the powers granted thereby were to be exercised by the company and by the owners of lands as if re-enacted; and the like exemptions were allowed:—Held, first, that on the construction of 35 *Geo. III. c. xliii*, persons occupying land on the Paddington Cut could not carry manure on the canal free from toll; secondly, that the provisions of the several public local Acts with respect to tolls on different cuts, part of the same canal, might be compared in order to ascertain the meaning of a clause in the Paddington Act, alleged to create exemptions from tolls upon the Paddington Cut.

Beneficial
interest in
tolls renders
a company
liable for
negligence in
works.

As has been noted above, the possession of a beneficial interest in the tolls of a canal renders a company liable to actions for nuisance where damage is caused by negligence with regard to their works.¹

Distress
incident to
tolls.

A right of distress is incident to every toll.² Where a canal company was empowered by its Act to take tolls for goods, and in case of nonpayment to distrain any carriage

¹ Pages 25, 79. *Manley v. St. Helen's Canal*, 2 H. & N. 840; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & E. 213; *Mersey Dock v.*

Gibbs, 11 H. L. Cas. 686, &c.; *ante*, pp. 271, 455, 544.

² See *ante*, p. 516.

or goods in respect of which such tolls ought to be paid; it was held, that trams could not be distrained for arrears of tolls due from the owners for goods carried in them if they were not carrying goods of such owners at the time of distress.¹ Similarly, in *Fraser v. Swansea Canal Co.*,² it was held, that where a canal company were authorized to impose rates of toll for carriage of goods; and in case of nonpayment to seize the goods and the boats laden therewith, and if such goods were not redeemed within seven days to sell the same; this clause did not empower them to distrain goods when no longer on the canal or to sell the boats.

Rates.

It is proposed now to consider the liability of the various rights of water that have been treated of to be assessed for the payment of poor rates. Rates.

The present system of parochial relief is based upon the stat. 43 Eliz. c. 2,³ the last important measure of a series of enactments on the subject, which provides for the appointment of "the churchwardens of every parish, and four, "three or two substantial householders," under "the hand and seal of two or more justices of the peace in the same county," as overseers of the poor of the same parish, and directs the said overseers to "take order" with consent of the justices "for setting to work the children of "all such whose parents" they shall deem unable to maintain them, as well as "all such persons, married or unmarried," who are unable to maintain themselves and 43 Eliz. c. 2,
s. 1.
Basis of
system of
rating.

¹ *Jenkins v. Cooke*, 1 A. & E. 872.

² 1 A. & E. 354; see too Woolrych, 61.

³ See the remarks on the history and development of this branch of law in Castle on the Law of Rating, p. 1. The principal authorities and statutes to be noted are:—The Mirror of Justice, sect. 3; Bl. Comm. vol. i. c. ix. sect. 6; Dalton's Justice of the Peace; 5 Edw. III. c. 14; 7

Ric. II. c. 5; 12 Ric. II. c. 7; 15 Ric. II. c. 6; 11 Hen. VII. c. 2; 19 Hen. VII. c. 12; 22 Hen. VIII. c. 12; 27 Hen. VIII. c. 25; 3 & 4 Edw. VI. c. 16; 2 & 3 Philip and Mary, c. 5; 5 Eliz. c. 3; 18 Eliz. c. 3; 39 Eliz. c. 3; 43 Eliz. c. 2; 3 Car. I. c. 4; see Castle, pp. 1—25. See too for the statutes dealing with the subject, and for a digest of the decisions thereon, Chamber's Law relating to Rates and Rating.

“ use no ordinary and daily trade of life to get their living
 “ by ;” and, *lastly*, empowers them “ to raise, weekly or
 “ otherwise, (*by taxation of every inhabitant, parson, vicar,*
 “ *and other, and of every occupier of lands, houses, tithes im-*
 “ *propriate, appropriations of tithes, coal mines, or saleable*
 “ *underwoods in the said parish*, in such competent sum or
 “ sums of money as they shall think fit), a convenient
 “ stock of flax, hemp, wool, thread, iron and other neces-
 “ sary ware and stuff to set the poor on work. And also
 “ competent sums of money for and towards the necessary
 “ relief of the lame, impotent, old, blind, and such other
 “ among them being poor and not able to work, and also
 “ for the putting out of such children to be apprentices, to
 “ be gathered out of the same parish *according to the ability*
 “ *of the same parish*, and to do and execute all other things
 “ as well for the disposing of the said stock, as other-
 “ wise concerning the premises, as to them shall seem
 “ convenient.”¹

¹ 43 Eliz. c. 2, s. 1—This statute referred to personal as well as real property, but the custom of not rating the former early arose, and was soon universally followed; and by 3 & 4 Vict. c. 89, it was finally exempted from assessment. The principles now governing the law of assessment were laid down in *Sir Anthony Earby's case* (3 Bulstrode, 34; cf. Dalton's Justice of the Peace; and see Castle's Law of Rating, pp. 17—23), and are now regulated by the 6 & 7 Will. IV. c. 96; s. 1. of which provides: “Whereas it is desirable to establish one uniform mode of rating for the relief of the poor throughout England and Wales, and to lessen the cost of appeals against an unfair rate,” it shall be enacted “that from and after such period, being not earlier than the twenty-first day of March next after the passing of this Act as the Poor Law Commissioners shall by any order under their seal of office direct; no rate for the relief of the poor in England

“ and Wales shall be allowed by
 “ any justices, or he of any force,
 “ which shall not be made upon
 “ an estimate of the net annual
 “ value of the several heredita-
 “ ments rated thereunto, that is to
 “ say, *of the rent at which the same*
 “ *might reasonably be expected to let*
 “ *from year to year, free of all usual*
 “ *tenants rates and taxes, and tithe*
 “ *commutation, rent-charge, if any,*
 “ *and deducting therefrom the pro-*
 “ *bable average annual cost of the re-*
 “ *pairs, insurance and other expenses,*
 “ *if any, necessary to maintain them*
 “ *in a state to command such rent:* Pro-
 “ vided always, that nothing herein
 “ contained shall be construed to
 “ alter or affect the *principles, or dif-*
 “ *ferent relative liabilities, if any, ac-*
 “ *cording to which different kind*
 “ *of hereditaments are now by law*
 “ *rateable*” (cf. Castle's Law of Rating, 350—358, where the learned author says that: “The principal difference between the law before and after the passing of the Parochial Act, is, that formerly the rate might be on any proportion

It is proposed to consider the rateability of rights connected with water in the following order:—

- I. Piers, Harbours, Docks and Marine Property.
- II. Rivers and Ferries.
- III. Fisheries.
- IV. Canals.
- V. Water Companies; and
- VI. Bridges.

An estuary or arm of the sea is *primâ facie* extra-parochial; but this presumption may be rebutted,¹ and, with respect to the presumption of extra-parochiality, there is no distinction between the sea shore and the shore of a tidal river.²

Piers, harbours, docks and marine property.

Estuaries and arms of the sea primâ facie extra-parochial.

Where a wet dock was constructed on a portion of land reclaimed from the ooze or bed of a navigable tidal river, and in order to prove that it was not part of the adjoining parish, evidence of perambulations of that parish, and of others abutting on other portions of the reclaimed land was given, which seemed to show that the rights of those parishes extended only to high water mark; but, against this, it appeared that in each of the parishes considerable tracts were reclaimed from the ooze or bed of the river, and rated to the poor; it was held, that the presumption of parochiality, arising from payment of these rates, outweighed the contrary presumption arising from the perambulations.³

“of the net profit, provided, with-
“in the parish, all lands were
“rated on the same proportion,
“whereas after the Act the net
“value is made the basis that is
“to be universally adopted;” cf.
Rex v. Adames, 4 B. & Ad. 61; and
Reg. v. Capel, 12 A. & E. 382.

With regard to the question for and over what period of time the value of property is to be ascertained, it must be noted, “first
“that property must be valued in
“*communibus annis*, for the rent at
“which the property may be ex-

pected to let must be based on
“an average of past years; se-
“condly, the entire value of the
“property occupied within the
“year is to be taken” (*Castle’s Law*
of Rating, p. 472; and see p. 460
et seq.).

¹ *Ipswich Dock Commissioners v. St. Peters*, *Ipswich*, 7 B. & S. 310.

² *Trustees of Duke of Bridgewater v. Surveyors of Highways for Bootle-cum-Linacre*, 7 B. & S. 348.

³ *Ipswich Dock Commissioners v. St. Peters*, *Ipswich*, *supra*.

The main sea
is extra-paro-
chial.

Reg. v. Musson.

*McCannon v
Sinclair.*

Blackburn, J., *inter alia*, remarked:¹ “In *Reg. v. Musson*,² it was rightly decided that what Lord Hale terms “the main sea is *primâ facie* extra-parochial, and in the absence of evidence that it forms part of a parish, it must be taken that it does not; and the same reason that it is part of the waste and demesnes and dominions of the Crown, would apply to an estuary or arm of the sea; it is a part of the great waste, both land and water, of which the king is lord. This seems to be so *primâ facie*, whatever evidence there may be to rebut it. Lord Hale, in the first part of the same chapter³ (Harg. Law Tracts, p. 10), says: ‘Thus much concerning freshwater or inland rivers, which, though they empty themselves immediately into the sea, are not called arms of the sea, either in respect of the distance or smallness of them.’ The distance from the sea, and the small size of the stream, are two of the elements for determining how far the river extends, and when the arm of the sea begins; upon which depends *primâ facie* whether it is to be considered parochial or not. In *McCannon v. Sinclair*,⁴ which bears very much on the present case, and where the question was as to the parochiality of the bed of the Thames, in a part much farther from the main sea than the dock here in question, and much more like an arm of the sea than the channel of the Orwell at this point, the Court decided, according to the report in 2 E. & E. 53, that the presumption was against parochiality, but that it might be proved by evidence, and it was proved that the bed of the river was not extra-parochial. So in the river Orwell, looking at the distance of the dock from the sea, and the size of the stream, inasmuch as the tide flows and reflows, and the channel is navigable, the *primâ facie* presumption seems to be that it is extra-parochial.”⁴

¹ *Ipswich Dock Commissioners v. Overseers of St. Peters*, 7 B. & S. 311.

² 8 E. & B. 900.

³ Pars Prima, Ch. 4.

⁴ 2 E. & E. 53; cf. *Trustees of Duke of Bridgewater v. Surveyors of Highways for Bootle-eum-Linaere*, 7 B. & S. 349.

By sect. 55 of *The Local Government Act*, 1858, “the occupier of any land covered with water, or used only as a railway constructed under the powers of any Act of Parliament for public conveyance,” is to be assessed to the district rate at one-fourth only of the net annual value as ascertained by the last poor rate. It has been held that a wet dock was “land covered with water” within this provision; and that a railway which had been constructed by a dock company in connection with their docks, and joining a public railway and canal under the powers of their private Act, by which the company were bound to complete the railway for the use of the public on the payment of tolls, was a railway within the provision, although it was not constructed to carry passengers.¹

Land covered with water.

Where two companies, incorporated under *The Companies Act*, 1864, received tolls for the use of a pier which extended from the shore into the sea for several feet below low water mark, being constructed of a wooden deck resting on iron piles driven into the sands, so that the water flowed under it, and no alteration was made in the line of low water mark; it was held, that the part of the pier below low water mark, being beyond the realm, was not extra-parochial within the meaning of 31 & 32 *Vict. c. 122, s. 27*, and, as such, annexed to any other parish, nor was it an accretion from the sea; and that, therefore, that section did not enable it to be rated.²

¹ *Reg. v. Newport*, 31 L. J., M. C. 267.

² *Blackpool Pier Co. v. Fylde Union*, 46 L. J., M. C. 189; 36 L. T. 251; 41 J. P. 344. Sect. 27 of 31 & 32 *Vict. c. 122*, is as follows:—“From the 25th day of December next, every place which was or is reputed to be extra-parochial, whether entered by name in the report upon the census for the year 1851, or not, for which an overseer has not been then appointed, or for which no overseer shall then be acting, or which has not been then annexed or

“incorporated with the next adjoining parish, shall, for all civil and parochial purposes, be annexed to and incorporated with the next adjoining parish with which it has the largest common boundary; and in case there shall be two or more parishes, with which it shall have boundaries of equal extent, then with that parish which now contains the lowest amount of rateable value; and every accumulation from the sea, whether natural or artificial, and the part of the sea shore to the low water mark,

By an Act of Parliament, certain commissioners were appointed for effecting improvements in the harbour of S. They were authorized and required to deepen and cleanse the channel of the harbour, and to make an artificial entrance with piers, by which ships might pass from the sea into the harbour. Tolls were to be paid in respect of such vessels as entered the harbour, but were not to be received by the appellants to the full amount authorized by the Act, until the whole works were completed. The piers were erected, and the channel deepened and cleansed, and the commissioners received tolls in respect of the vessels which entered the harbour. There was nothing in the Act to show that they were to be considered as purchasers or owners of the land upon which the works were to be done:—Held, first, as to the channel, that the commissioners had simply a power to make a right of passage from the sea to the harbour, and that they were not rateable to the poor rates in respect of such right of passage; secondly, that although they were occupiers of the land upon which the piers stood, yet that the occupation could not be taken to be enhanced in value by the revenue derived from the tolls, inasmuch as an occupier of the piers would get no part of the tolls, or derive any benefit from the harbour; and, therefore, that the appellants were not liable to be rated to the poor rates, the piers themselves being worth nothing.¹

Parish extending along the shores of a river.

Where, in beating the boundaries of the parish of Rotherhithe, it was shown that the authorities proceed along the embankments, wharves, or other shore of the

“and the bank of every river to the middle of the stream, which on the said 25th day of December next shall not be included within the boundaries of, or annexed to and incorporated with, any parish, shall, for the same purpose be annexed to and incorporated with the parish to which such accretion part or bank

“adjoins, in proportion to the extent of the common boundary.” See remarks of Lord Coleridge, C. J., on the construction of this section; 46 L. J., M. C. 191. See, too, *ante*, Chap. I. p. 13.

¹ *New Shoreham Harbour Commissioners v. Lancing*, 39 L. J., M. C. 121; L. R., 5 Q. B. 489; 22 L. T. 434.

river, while in the adjoining parish of Bermondsey the authorities go along the middle of the river—and that the parish of Rotherhithe has never done or exercised any parochial act or authority beyond the embankments, &c.—it was held that the inference from the above circumstances was, that the parish of Rotherhithe extended to the middle of the river, and that, therefore, a pier built on piles in the bed of the river opposite one of the embankments, but not connected with it, was rateable to the poor rate of the parish.¹

By sect. 33 of 3 & 4 *Will. IV. c. 90*,² the owners and occupiers of houses, buildings, and property, other than land rateable to the relief of the poor, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of the Act. It has been held,³ where certain appellants were the occupiers of certain docks, covering an area of 165 acres, 95 of which formed a wet dock or tidal basin, that this dock or basin was property *ejusdem generis* with the houses and buildings mentioned in the Act, and, therefore, that the appellants were rateable at the higher amount.

Profits, if rated at all, must be rated where they are earned.⁴

In *Reg. v. Bristol Dock Co.*,⁵ the question of the rateability of dock dues, and of the profits of such undertakings as water companies and canals, was raised.

By 43 *Geo. III. c. cxl* ("An Act for improving the Port of Bristol"), a dock company was formed with power to convert a portion of a navigable river within the city into

Wet docks.

Profits of docks must be rated where they are earned.

¹ *McCannon v. Sinclair*, 28 L. J., M. C. 247; 2 E. & E. 53; 33 L. T., O. S. 226.

² The Watching and Lighting Act.

³ *Peto v. West Ham*, 28 L. J., N. S., M. C. 240; 2 E. & E. 144; per Lord Campbell, C. J., Wightman, J., and Crompton, J.; Erle, J., holding that they were rateable

at the lower amount, as the area of ninety-five acres was land.

⁴ *Reg. v. Bristol Dock Co.*, 10 L. J., M. C. 105; see Castle, p. 415; cf. *Rex v. Hull Dock Co.*, 7 T. R. 219; *Rex v. Hull Dock Co.*, 5 M. & S. 394.

⁵ 10 L. J., M. C. 105; 1 Q. B. 335; 1 G. & D. 76.

a floating harbour, and to make a new course for the river, and a basin, to form a passage from the new course into the floating harbour, and to execute divers other works. The port is entered in the river Severn, nearly thirty miles from the parish in which the basin is situate.

By sect. 74, certain dues were payable to the company for every ship entering the port, which dues, after defraying the expenses of repairing the basin and the other works, were to be divided among the shareholders of the company.

By sect. 64, reciting that the lands which the company were authorized to take for the execution of the above works would, during the time the said intended works were carrying on, and for many years afterwards, be rendered unproductive, and be incapable of being rated in aid of the land and parochial taxes, the company were made chargeable from the time of their taking possession of such lands with all such land and parochial taxes as the same lands were then or might thereafter be subject to.

It was held that no portion of the dues payable by ships on entering the port was a profit arising from the basin; and that the basin was rateable to the relief of the poor as ordinary land, and not in respect of such dues.¹

*Reg. v. Hull
Dock Co.*

The doctrine laid down in *Reg. v. Bristol Dock Co.*,² that no portion of the dues payable by ships on entering that port was a profit arising from the land, and that the land was rateable as ordinary land, came under consideration in *Reg. v. Hull Dock Co.*³ There the company constructed a harbour and docks under provisions of 14 *Geo. III. c. 56*, but the former was distinct from the latter, and they had no property in the harbour, though the soil of the docks was vested in them. They were, however, empowered to take toll on all vessels, whether they used the docks or not,

¹ See judgment of Lord Denman, C. J., and the cases there cited, 10 L. J., M. C. 111.

² 10 L. J., M. C. 105.

³ 14 L. J., M. C. 114; 7 Q. B.

2; 9 J. P. 405; see Castle on Law of Rating, p. 215; cf. *Rex v. Dock Company of Hull*, 1 T. R. 219; *Rex v. Hull Dock Co.*, 5 M. & S. 394.

coming into the harbour, and the Court held that the company were rateable for such dues as were paid by ships using the docks, and drew a distinction between the tolls paid by ships merely entering the harbour, and those paid by ships afterwards using the docks. "To those which come into the docks," said Lord Denman, C. J., "the benefit is conferred by the docks, and in the docks, and therefore the toll paid for that benefit must be held to be earned there, in the docks, and be profits arising there. As to those ships which do not come into the docks, and which never are on the property of the company at all, the case is very different. The toll given to the company, and which such ships are obliged to pay, is doubtless given in respect of the company having made those docks, but still it does not arise from the use of the docks, nor is it earned in them. It is a naked toll, just as much as toll paid by vessels passing lighthouses in similar cases."

Mr. Castle points out¹ that the view of the law taken in the *Bristol Dock Co.'s case*, does not now obtain, since railways and other properties are now habitually rated parochially for earnings collected elsewhere.

The question of the apportionment of the earnings of docks was raised in the case of *The Hull Dock Co.*, who are the owners and occupiers of several docks and basins communicating with each other, formed under various statutes at different times, and which are situate in several parishes. They are entitled to tonnage duties for every ship coming into or going out of the harbour, docks or basins, or unloading or lading any of their cargo within the port, such duties being payable as soon as the vessels enter any of the docks or the harbour. By one of their Acts, no vessel passing up or down the rivers Hull or Humber without entering any of the docks or basins, is to be subject to toll, unless it shall land or discharge part of its cargo in the old harbour, or within that part of the

Apportionment of earnings of docks.

¹ Page 215.

Humber which is in the port of Hull, in which event tonnage rates are to be paid only in respect of goods so landed or discharged. No separate accounts are kept for the several docks, and there is only one set of officers for the whole establishment. No distinct or separate rates or duties are payable for the use of any particular dock or docks, nor any accumulative rates for the use of all or any number of them, but the same rates are payable into whatever dock vessels go, and whether they use only one or more of the docks they pay only one single toll; and no additional charge can be made for a vessel lading her cargo outwards in one dock, and discharging her cargo inwards in another of the docks. The further tonnage dues payable for vessels remaining above ten months have always been paid generally, and without regard to their remaining in one particular dock.

The net rateable value of the whole of the docks having been ascertained by making the proper deductions from the gross receipts from the tonnage dues received by the company in respect to all the docks:—Held, that their entire rateable value ought to be apportioned among the several parishes within which the docks, &c. were situate, in proportion to the areas of the docks, &c. respectively within such parishes.¹

¹ 21 L. J., M. C. 153; see too Castle's Law of Rating, p. 417. Lord Campbell, C. J., said: "I am of opinion that our decision should be in favour of the appellants, and I have little to add to what is stated in the case. *The King v. Dock Company of Hull*, and *The Queen v. Hull Dock Co.*, do not assist us, because in both those cases the sole question raised was as to the rateability and not as to the mode of apportioning the rateable value among the parishes in which the profits were made."

In *Rex v. Hull Dock Co.* (1 T. R. 219), it was held, that lands purchased by a company, and converted

into a dock according to an Act of Parliament, declaring the shares of the proprietors should be considered personal property, were rateable to the poor in proportion to the annual profit.

In *Reg. v. Hull Dock Co.* (7 Q. B. 2; *S. C.*, 14 L. J., M. C. 114), the company in accordance with their Act, 14 Geo. III. c. 56, made a dock in the parish of T., communicating with the harbour or river Hull and the river Humber. The dock is in their own land, granted under sect. 18 of the Act. They have no right of property in the harbour, and occupy nothing on the shores of the Humber, except the entrance basin of the dock. The port of Hull,

A somewhat similar case is that of *The Mersey Docks and Harbour Board v. Overseers of Liverpool*,¹ where the appellants occupied docks in several parishes and townships on the Lancashire and Cheshire sides of the Mersey. By the Act of Parliament relating to these docks, it is provided, that they shall be held and administered as one estate under one management. The rates for using the dock property are for the most part uniform, and any vessel having once paid the dock rate is entitled to use all docks where the rates are not larger, and to use any other docks on paying the difference. The docks on the Lancashire side of the Mersey are by far the most profitable part of the undertaking, which is carried on at a loss on the Cheshire side of the river. The appellants had been rated by the parish of Liverpool on the principle of ascertaining the net income of the docks, &c. locally situated within the parish of Liverpool, without taking into account the profits of the whole undertaking:—Held, that the parochial principle must always, except in cases of insuperable difficulty,² be preferred; that no such difficulty was shown in the present case, and that the assessment was accordingly right.

Cockburn, C. J., said: “We need not call upon Sir John Karslake to argue for the respondents, as we are of opinion that our judgment should be in their favour.

in the popular sense (adopted in this case), includes the Humber to the mid stream, and all ships using these docks pass through this portion of the Humber. Some discharge and load their cargoes in the Humber or the harbour without using the dock or entering upon any property of the company; but these, as well as the ships entering the dock, pay the tonnage duties:—Held, on appeal against a poor rate for the parish of T., 1st. That even assuming the word harbour in sect. 42 of the Act to be synonymous with “port,” so that the duties attached on all ships enter-

ing the port, whether they came into the dock or not, still that the company were rateable for the duties on ships which actually did enter the dock, those duties being profits of the company’s land in T. accruing there; but held, 2nd, That they were not rateable in T. for the dock in respect of duties which were paid by ships not entering or using it.

¹ 41 L. J., M. C. 161; L. R., 7 Q. B. 643; 26 L. T. (N. S.) 868; 37 J. P. 165.

² As in *The Queen v. Kingston-upon-Hull Dock Co.*, 21 L. J., M. C. 155; S. C., 18 Q. B. Rep. 325.

“The *Hull Dock case*¹ establishes, that where a series of docks are contiguous to each other, forming a part of an entire system with tolls so fixed that each vessel, after paying one toll, is entitled to the benefit of any one or more of the series of docks, the principle of parochial rating cannot be applied, but recourse must be had to the acreage principle. Nevertheless, the language of the judges in that case, shows that the acreage system must not be resorted to except *ex necessitate rei*. The present case, however, is distinguishable from the facts before the Court in the *Hull Dock case*, because the docks now in question do not appear to constitute one entire series. Some are on one side of the river, and others on the opposite side of the river Mersey, and they do not come within the description of an entire system of docks. It is true, that by several local Acts they are united in one undertaking. Under the Act of Parliament, they are united for the purpose of general management and pecuniary operations; but the fact remains, that they are two distinct estates, which are considered as one property for the purposes of general management. . . . This property must be rated according to the existing state of things, and our judgment must be for the respondents.”

“The difference between this case and the *Hull Dock case*,” says Mr. Castle,² “seems to be one of distance only. In the latter case the docks all lay in close connection with one another, so that a vessel might pass from one to the other, whereas in the former the river Mersey divided the two harbours, which were, therefore, in fact separate and divided properties.”²

Allan v. Overseers of Liverpool.

Inman v. Overseers of Liverpool.

Allan v. Overseers of Liverpool, and Inman v. Overseers of Kirkdale,³ raised the question as to whether certain

¹ 18 Q. B. 325; S. C., 21 L. J. Rep., N. S., M. C. 153.

² Castle's Law of Rating, p. 418.

³ 43 L. J., M. C. 69; L. R., 9 Q. B. 180; 30 L. T. 93; 38 J. P. 260.

persons were rateable as occupiers through the fact that the Mersey Dock and Harbour Board, under the powers of their Act, appropriated certain accommodation in the docks for their use ; in the first case certain berths for the use of steamers with sheds attached ; and in the other a certain space as a coal dépôt. The cases were stated under sect. 11 of 12 & 13 *Vict. c. 45*, on appeal from certain poor-rates, in which was included the name of the Mersey Dock and Harbour Board as co-respondents, they managing the docks under the provisions of a Local Act, section 64 of which enacted that the board might from time to time, upon payment of such rents or other sums of money, and subject to such restrictions or regulations as they should think proper, set apart and appropriate any particular position, or any dock, shed, or any other works to the exclusive accommodation and use of any company, &c. engaged in carrying on any trade, who should be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or conveyed by them, provided that every company, &c. to whom such exclusive accommodation should be afforded, and their vessels, crews, servants, &c., should be subject to the general rules and regulations of the board applicable to their docks, sheds, &c., and the vessels entering the same, and the crews and other persons employed in and about such vessels.

By sect. 82, the board might construct such dépôts and sheds for the reception of goods, and might provide such other conveniences upon or near the quays as they should think expedient for the accommodation of the trade of the port of Liverpool, and might let any such sheds, and also any portion of the quays which, with or without such sheds, they might think fit to appropriate.

It was held, that the board had not parted with the occupation of any part of such sheds so as to render the appellants rateable in respect of such occupation.

It is to be noted that "a rate is not always imposed on

“property in that particular year in which it makes a productive return,”¹ but, as has been stated above, must be valued *in communibus annis*.² Thus, in the case of *Rex v. Hull Dock Co.*,³ the company were held rateable in respect of the tonnage duties received by virtue of 14 *Geo. III. c. 56*, though it appeared that the expenditure in repairs during the period for which the rate was made exceeded the amount of the duties received.

Exemption of
the Crown
from rates.

Dockyards in the occupation of the Crown, or occupied for government purposes, are exempted from the payment of rates.⁴ But tenants of the Crown holding for their private benefit are rateable.⁵

The *Mersey*
Dock cases.

These two points were thus decided by the House of Lords in the *Mersey Dock cases*,⁶ where it was held, that the Crown not being named in 43 *Eliz. c. 2*, property in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown is not rateable to the relief of the poor. Their lordships moreover were of opinion that the statute is in its provisions general and inclusive, and no other principle applying to create an exemption from those provisions, all property capable of beneficial occupation, and which, if left to a tenant, would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are applied exclusively to the maintenance of the works.⁷

In each of these cases the Mersey Docks and Harbour

¹ Lord Ellenborough in *Rex v. Hull Dock Co.*, 5 M. & S. 400; *Rex v. Mirfield*, 10 East, 219.

² *Ante*, p. 595, note; see Castle, p. 460 *et seq.*

³ 5 M. & S. 394.

⁴ *Mersey Dock cases*, 11 H. L. C. 443; 35 L. J., M. C. 1; see Castle, p. 95.

⁵ *Ib.* See opinion of the judges per Blackburn, J.; see Castle, p. 102.

⁶ *Jones v. Mersey Dock and Harbour Board, Mersey Dock and Harbour Board v. Cameron*, 11 H. L. Cas. 443; 35 L. J., M. C. 1.

⁷ *Ib.*

trustees had brought an action of replevin in the Court of Common Pleas to try the question of their liability to a rate for the relief of the poor. In the case of *Jones*, where the question of rateability only was raised, judgment was given in favour of the Mersey Dock trustees in conformity with *The King v. Inhabitants of Liverpool*.¹ In the case, however, of *Cameron*, where, in addition to the question of liability to the rate, the point at issue was, whether an action of replevin was maintainable, the Court were of opinion that there ought to be judgment for the defendants. Appeals were brought in both cases, and after hearing the opinion of the judges on three points raised as to the construction of 43 *Eliz.*, and of the special Acts constituting the trustees the "*Mersey Docks Board*," and appointing them to have the control of certain docks, &c. vested in them as such trustees in order to maintain these docks for the benefit of the shipping frequenting the port of Liverpool, it was held by the House of Lords (overruling the cases of *Rex v. Salter's Load Shuice*² and *Rex v. Liverpool*³), that the trustees were liable to be rated as occupiers, though they occupied such docks, &c. only for the purposes of their Acts and derived no benefit from the occupation.

Recent Acts had expressly declared that certain warehouses and parts of the docks, then for the first time erected and put under the control of the trustees, were to be liable to rates. Per Lord Chelmsford: these Acts did not, by implication, declare that the other parts of the docks were not liable to rates.⁴

We will conclude this notice of the rateability of docks by pointing out the class of deductions allowed in assessing them.

Deductions allowable in assessment of docks.

*Reg. v. Southampton Dock*⁵ is noteworthy on this head.

¹ 7 B. & C. 61.

² 4 T. R. 730.

³ 7 B. & C. 61.

⁴ 11 H. L. 444. See the judgments in this case, where the whole

law as to the rateability of bodies holding for charitable or semi-public purposes was reviewed.

⁵ 20 L. J., M. C. 155; 14 Q. B. 587.

The premises of the company consisted in part of the custom house rented and occupied by her Majesty's Commissioners of Customs, and a manufactory and several workshops, rented and occupied by the West India Mail Packet Company and J. W. The company under section 188 of their Act, which empowered them to build or provide out of their income steam tugs for towing vessels into or out of the docks from or to Southampton or to any part of the British Channel, had actually in use a steam tug which offered considerable advantages to those who used the docks, and was conducive to the general profits of the dock business, though it was not indispensable, since other steamboats might have been hired at Southampton for the same purpose, but at less advantage and convenience to the company and those using the docks. Attached to the freehold and essential to the business of the company was a certain fixed plant, consisting of cranes, steam engines, shears, derricks, dolphins, and other ponderous machinery, which, however, were capable of being detached as easily and with as little injury to the freehold as tenants' fixtures put up for the purposes of trade and business, and usually valued as between incoming and outgoing tenants.

It was held, upon a case stated as to the extent of the company's liability to be rated to the relief of the poor:—

1st. That sect. 25 of 13 *Geo. III. c. 50*,¹ which provided that every person, whether landlord or tenant, who should let out his house in separate apartments or ready furnished to lodgers, should, for the purposes of the Act, be deemed the occupier and liable to be rated, did not apply to the part of the company's premises of which they were not the occupiers.

2nd. That the steam-tug must be taken as ancillary to the docks, and a part of the floating capital, and that the expense of it was a proper deduction to be made in estimating the amount of the company's assessment to the rate.

¹ "For the better regulating the poor, &c. of Southampton."

3rd. That as an allowance to the directors for management, another proper deduction to be made was a reasonable amount of remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company in managing the affairs of the docks, independently of the profit on capital employed by him.

4th. That the cranes, &c. and other ponderous machinery were properly included in estimating the rateable value of the company's premises.

5th. That no deduction could be made for income tax in respect of the estimated profit of a supposed tenant of the docks, that not being a tax upon the subject-matter rated, but upon the net income of the tenant after paying the rent of the premises.¹

In ascertaining the net rateable value of the property assessable to the poor rate, an allowance is to be made for rates and taxes, and such allowance ought to be made upon the net rateable value after the rates and taxes themselves, in addition to all other proper allowances, have been deducted.²

There have been many decisions as to the rateability of bodies, like floating piers or docks, barges, hulks, and the like, which, while not themselves occupying the soil, are either attached to floats, &c. fixed in it, or otherwise kept permanently in the same position; the question being usually whether they are in permanent beneficial occupation of the soil in the parish, and also whether such bodies have increased the rateable value of the occupation of the moorings.³

In *Reg. v. Leith*,⁴ under a local Act enabling trustees to levy rates upon persons holding or enjoying any tene-

Rateability of marine property not actually occupying the soil.

Floating piers and floating docks.

Reg. v. Leith.

¹ As to tenant's profits, see further, *Mersey Docks v. Liverpool*, L. R., 9 Q. B. 84; 43 L. J., M. C. 33; 29 L. T. 454; 38 J. P. 27.

² *Tyne Improvement Commissioners v. Churchwardens and Overseers of Chirton*, 32 L. J., M. C. 192; cf.

Rex v. Hull Dock Co., 2 B. & C. 516.

³ 21 L. J., M. C. 119; 1 E. & B. 121; 18 L. T., O. S. 121; 16 J. P. 310.

⁴ See the remarks of Mr. Castle as to *floating bodies*, pp. 180—182.

ments, land, building ground, hereditaments or premises in the district, a steamboat company were rated in respect of their floating pier or landing-place, by the description of "tenement, land, landing-place and premises, and the brow or brows, barge or barges, &c., lying upon, fixed to, or connected with, the same tenement, land, landing-place or premises, and the easement or easements, anchorage or anchorages, held, used, or enjoyed therewith," &c. The pier consisted of three floating barges, boarded over and kept in their places by chain cables fastened to anchors sunk in the bed of the river; the barges were connected by wooden bridges, the first bridge resting on the first barge at one end, and the other end being fastened to a platform resting upon an abutment attached and made fast to the wall of a building on the shore. Both bridges and barges rose and fell with the tide. Passengers embarking by the steamboats passed through the floor of the building, where a fare was paid, and then proceeded over the platform, bridges and barges to the steamboats. The ground floor, as well as the said pier and landing-places, were in the exclusive occupation of the steamboat company:—Held, that the rate was laid not on the barges, &c., as distinguished from the land, but on the landing-place and premises together with the floating barges, &c., by which the occupation of the land was rendered more profitable, and that the rate was therefore valid.

The ground floor of the building was rented of one J. S. by the company, and formed part of a mill, the residue of which was occupied by J. S. In the rate in question, J. S. was assessed for "the mill and premises, exclusive of the steamboat pier:—"—Held, that this meant to exclude not the floating barges, but the ground floor and landing-place occupied by the company; and, therefore, the latter were not twice rated.

*Reg. v.
Morrison.*

This case was referred to in *Reg. v. Morrison*,¹ which

¹ 22 L. J., M. C. 15; 1 E. & B. 150; 20 L. T., O. S. 190; 17 J. P. 24; cf. *Castle*, pp. 185, 186.

raised the question of the rateability of a floating dock. There one M. occupied a building yard on the bank of a tidal navigable river, owners of lands on the banks of which paid an acknowledgment to the conservators. On the river itself was a ship dock belonging to M., which floated at high water, and grounded at low water, to which his workmen passed by a plank resting on it, and on the land of the yard, and which was fastened by a staple to the dock. The dock was moored by chains to the bed of the river and to the yard, the chains being capable of being slackened, to enable the dock to be taken into deeper water, which often occurred, while the harbour master sometimes removed the dock altogether; it was held, that the floating dock could not be rated as accessory to the yard—Lord Campbell, C. J., distinguishing the case from *Reg. v. Leith*, since there the pier was permanently fixed to the landing-place.

A floating pier on the river Thames which rose and fell with the tide, and was kept in its place by an iron chain attached to an iron post affixed to the stairs, which were the landing-place, and by iron chain cables fastened to anchors placed in the bed of the river, has been held rateable to the poor rate.¹

Reg. v. Forrest.

The corporation of Oxford were the owners of the soil and bed of the river Isis. A boat club, comprised of members of the University of Oxford, were possessed of a barge or house boat floating on the river and moored there at a distance of about thirty feet from the bank by two iron rings fixed to the barge, and passing loosely and moveably round two solid fixed posts driven into the bed of the river. These posts were of such a diameter as to allow the barge to rise and fall with the water of the river. Between the barge and the bank four other posts were driven into the bed of the river; and the club were possessed of a moveable frame of boards laid on the top of

Grant v. Oxford Local Board.

¹ *Reg. v. Forrest*, 30 L. T., O. S. 284; *Forest v. Greenwich Churchwardens*, 8 E. & B. 890; 2 J. P. 130.

these four posts, but not fixed either to them or the bank, so as to form a gangway from the barge to the bank. The posts had remained driven in the bed of the river, without express licence of the corporation, for more than twenty years, and no rent had ever been paid by the club in respect of any of the posts. The barge was used as a means of access to boats, and as a dressing room:—Held, that the club were not rateable as occupiers of the posts, and of the barge attached to them.¹

Derrick
hulks.

Watkins v.
Gravesend.

In *Watkins v. Assessment Committee of the Gravesend and Milton Union*,² the question was raised of the rateability of the proprietors of a coal hulk built for the purpose of being fastened to moorings, which the Thames Conservators undertook to fix in the bed of the river, in order that she should be fixed thereto, the value of the land being enhanced by the mooring and anchorage. The moorings remained the property of the conservators, who made an agreement with the appellants in the following terms: “We, the conservators, grant liberty and licence to fasten, “and henceforth to keep fastened, his coal, coal-hulk, or “vessel called the Black Prince, to the moorings placed “by the said conservators in the said river at Gravesend “Reach, until either party shall have given to the other “one calendar month’s notice in writing to determine or “put an end to this licence. In consideration of which “the said William Watkins agrees with the said conserva- “tors to pay towards the expenses of the said conservators “in placing, and maintaining, and repairing, the annual “sum of 30*l.* 11*s.*”

It was held, that these words did not amount to a demise, and that the appellant was not an occupier, but merely a person having a licence to use the moorings.³

The above case was commented on by Willes, J., in

¹ *Grant v. Oxford Local Board General District Rate*, 38 L. J., M. C. 39; L. R., 4 Q. B. 9; 19 L. T. 378.

² 37 L. J., M. C. 73; L. R., 3 Q. B. 350; 18 L. T. 601; 32 J. P. 294.

³ See judgment of Blackburn, J.

*Cory v. Churchwardens of Greenwich.*¹ The latter was a case stated by a stipendiary magistrate under 20 & 21 Vict. c. 43.

The appellants were the owners of a coal derrick riding afloat on the river Thames within the parish of Greenwich, and retained at the spot where it floats by two single fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at the head and the other at the stern. The anchors and stones were merely dropped into the river, but, before dropping the stones, a small quantity of the ballast was removed in the bed of the river, so that the stones might lie flat and securely. The stones were merely to serve the purpose of anchors. The derrick was formerly attached in another part of the river, and was moved thence to its present position, bringing with it anchors and stones. It had been anchored at the same place for some years, but duly changed its position slightly with the ebb and flow of the tide, and by agreement with the Conservators of the Thames, in whom the soil of the bed of the river is vested, and who have the management, and by whose permission the derrick was moored where it was, it was liable to be removed by them to another part of the river. On the hearing of summonses against the appellants for non-payment of rates, to which they had been rated in respect of the moorings by which the derrick was attached to the soil, the magistrate found as a fact that the appellants were occupiers of the soil in the bed of the river, on which the moorings were placed.

It was held on appeal, however, that notwithstanding the finding of the magistrate, there was no such occupation of the soil of the river, upon the facts stated in the case, by the appellants as to make them liable to be assessed to the poor rate.

¹ 41 L. J., M. C. 142; L. R., 7 C. P. 499; 27 L. T. 150.

Willes, J., said, "They no more occupy the bed of the river than does the anchor of any vessel at anchor there. It is an easement or privilege of navigation. Loitering on the way does not make the loiterer an occupier. . . . In *The Queen v. Forrest*,¹ the landing could only be used at Greenwich, and the pier was fixed to the shore, but in this case the derrick moved about the river; so also there were in the above case fixed blocks on which one stage rested and occupied the ground when the tide was low. As to *Watkins' case*,² the moorings there were fixed and immovable, and part of the soil, and not of the vessel; and if the moorings in the present case were distinct from the vessel, and fixed to the soil, there might have been an occupation by them, but I will not follow out the reasoning of the Court of Queen's Bench to see whether or no the conservators would in such case be the occupiers."

Keating, J., said, "I think this case comes to nothing more than the floating barge anchored to the posts in the bed of the river, and that the case of *Grant v. Local Board of District of Oxford*³ binds us."

Rateability of
moorings in
the Thames.
Cory v.
Bristowe.

The law, however, on this subject has recently been fully stated in the case of *Cory v. Bristowe*,⁴ the question in the action being the liability of the plaintiffs to be rated to the relief of the poor in respect of certain moorings in the Thames.

Messrs. Cory, the appellants, who were the plaintiffs in the action, by permission of the Thames Conservancy, lowered stones and ballast into the bed of the river Thames, so as to make permanent moorings, to which they attached, by like permission, certain floating hulks, to be used for the loading and unloading of coal. The works

¹ 27 L. T., Rep., N. S., M. C. 96.

² *Watkins v. Overseers of Milton-next-Gravesend*, 37 L. J., M. C. 73; S. C., L. R., 3 Q. B. 350.

³ 38 L. J., M. C. 39; S. C., L. R., 4 Q. B. 9.

⁴ 2 App. C. 262; 46 L. J., M. C. 273; 36 L. T. 594; 41 J. P. 709.

were carried out under the superintendence of, and by workmen employed by, the conservancy, but at the cost of the plaintiffs, and the hulks were to be used subject to regulations laid down by the conservancy. A rent was to be paid by the plaintiffs to the conservators for the accommodation, and the moorings were to be removable at the pleasure of the conservators on a week's notice:—Held, affirming the judgment of the Court of Appeal, that the plaintiffs were in the exclusive, permanent, and beneficial occupation of the moorings, and rateable in respect of the same.

The Lord Chancellor,¹ after stating the facts of the case, continued: “These being the facts as to the moorings, I will, in the first place, ask your lordships to observe how completely they differ from the other cases which have been pressed on us. In the case of *Cory v. Churchwardens of Greenwich*,² a derrick was moored by means of two single-fluked anchors on the side nearest the shore, and by two stones on the channel side, and by two stream anchors, one at the head and the other at the stern. All these anchors and stones could be hauled on board the derrick by machinery, and were merely dropped into the river, and were in fact a part of the ordinary equipment of such a vessel. In this case, you have moorings which are fixed and embedded in the soil of the river Thames, and if you find persons in beneficial occupation of such moorings, they are within the statutes which constitute rateability.

“Now who is in occupation of these moorings? Undoubtedly the plaintiffs, and not the conservators, are in occupation of them. In *Watkins v. The Assessment Committee of the Gravesend and Milton Union*,³

¹ 46 L. J., M. C., p. 277.

³ 43 L. J., M. C. 69; S. C.,

² L. R., 7 C. P. 499; 44 L. J., L. R., 9 Q. B. 180.

M. C. 153.

“ there was a coal hulk which was moored in the river
“ Thames for the purpose of distributing coal by lighters ;
“ the hulk was moored near Gravesend ; there were two
“ screw piles driven in by and belonging to the conserva-
“ tors, who granted a licence to Watkins to use them. It
“ does not appear it was an exclusive permission, and from
“ the documents alone, it would appear that the conser-
“ vators might have moored their own vessels to these
“ piles. But assuming it was an exclusive permission,
“ yet these moorings were the moorings of the conser-
“ vators, and not of Watkins. And the Court held, and
“ I assume rightly, that it was merely a permission, not
“ an occupation. Whether or not, however, that case was
“ correctly decided, it does not bear on the present case,—
“ where moorings were laid down by and used exclusively
“ by the plaintiffs, and where they, and no others, are the
“ occupiers.

“ But let us look at the nature of the occupation. It
“ is clearly a beneficial occupation ; and, therefore, even
“ if it were a wrongful occupation, it would, I think, be
“ rateable. But this occupation arises in this way,—the
“ conservators have by their Act transferred to them all
“ the rights of the Crown in the soil of the bed of the
“ river Thames, and are the guardians and protectors of
“ the river for the purposes of navigation. They have
“ extensive powers to grant licences to place moorings in
“ the bed of the river, and were applied to by Messrs. Cory
“ for permission to lay down moorings for their derrick.
“ Accordingly a resolution was passed that permission be
“ given to Messrs. Cory to lay down moorings in a
“ position therein specified,—the work to be done to
“ the satisfaction of the commissioners, and under the
“ inspection of the harbour master, and to remain on cer-
“ tain specified conditions,—namely, amongst others, that
“ the accommodation be assessed, and rent paid thereon,
“ and with the full understanding on the part of Messrs.

“Cory that if at any time thereafter it should be found by the conservators inexpedient to permit the moorings for the derrick hulks to remain in that or any other part of the river, the conservators might, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed. Now I cannot look upon this resolution otherwise than as an exercise by the conservators of the powers of their Act. I therefore find fixed property, to the beneficial and permanent occupation of which the appellants and no one else can set up any claim, and this property arises out of a licence duly granted in exercise of parliamentary powers. On the whole, then, I am entirely satisfied with the unanimous judgment of the Court of Appeal, and more, that this appeal be dismissed with costs.”

In determining the rateability of certain wharves, it was held in *Reg. v. Doulais Iron Co.*,¹ that certain wharfage dues were to be taken into account in addition to the rent of the wharves themselves. Wharves.

“Anchorage and beaconage tolls” have been held to be rateable as connected with the use of the soil.² Anchorage tolls.

“The occupier of a lighthouse is rateable in respect of the *annual value* of the *lighthouse machinery*, &c., unless the occupation is that of the Crown; but the occupier is not rateable in respect of the tolls.”³ Lighthouses and light-house tolls.

In *Rex v. Rebowe*,⁴ the facts disclosed were that King Charles granted to Sir Isaac Rebowe liberty to erect lighthouses in Harwich, and towards the maintenance of them certain tolls and duties payable by all ships passing or coming into that harbour; and that in pursuance of this authority two lighthouses were erected, *Rex v. Rebowe.*

¹ 10 B. & S. 208, n.

² *Reg. v. Durham, Earl of*, 28 L. J., M. C. 232; 2 E. & E. 230; 1 L. T. 30.

³ Castle's Law of Rating, p. 197.

⁴ Cowp. 583; Cald. 155, 251; S. C., Loftt, 77; Const. 142, pl. 177; Nolan's Poor Law, vol. i. p. 99.

which Mr. Rebowe claimed under this grant and subsequent letters-patent. The duties he received annually amounted to 1,400*l.*, but only part thereof was received at the port of Harwich—the rest at many different ports in the kingdom. The collections were casual, as ships pass by or come into the harbour; and there was no other advantage arising from the lighthouses. The defendant occupied these lighthouses by two men kept in his pay to light and attend the fire and lamps, who had a bed or beds in the larger lighthouse to lie on alternately. Mr. Rebowe did not reside in the parish, nor was otherwise an occupier there than as above. He was rated for the lighthouse in the same proportion to the land tax as to the poor rate. The sessions were of opinion that he ought to be rated and assessed towards the relief of the poor of St. Nicholas parish, in respect of the said lighthouse and the duties collected and paid as aforesaid. Lord Mansfield, C. J., said: “They have, properly speaking, rated the fire and
“the profits arising from the licence. The Pantheon play-
“house, and other places of public amusement, are rated,
“I suppose, but not for their profits. We will, however,
“consider of it; but it seems to me, at present, that these
“duties are not rateable.” Subsequently he observed:
“We took some time to consider of the case of Mr. Rebowe,
“and we are all of opinion that he ought not be rated for
“the tolls. This property is not in the parish. They
“have not rated the house, but they have rated the tolls.
“The tolls are not locally situated within the parish, and
“therefore not rateable here.”¹

Rex v. Tynemouth.

In *Rex v. Inhabitants of Tynemouth*,² it was held that the tolls of a lighthouse situated in the township of Tynemouth, which tolls were collected out of the township in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable *quà* tolls in the town-

¹ Nolan's Poor Law, vol. i. p. 90, &c.; Bott's Appendix, p. 384.

² 12 East, 46.

ship. And the residence in such lighthouse by one as servant to the owner, and at an annual salary, to take care of the lights, is the occupation of the master, who alone can be rated in respect of such occupation of the toll-house.

"It is no question now," said Lord Ellenborough, C. J., "whether this property could be rated in some other way, as if the lighthouse, whose light is the meritorious cause of earning the tolls, were in consequence let at a larger rent; but this is a rate specially upon the tolls, and therefore the case is not distinguishable from *Rex v. Rebove*,¹ which is so immediately in specie, and in all its circumstances the same, that it concludes the question—What local property is there within the township? The subject-matter of the rate has no locality within this township. As to the other point, it is equally clear that it is the occupation of the master by his servant, and not the occupation of the servant himself; and therefore the rate on the servant is bad on that ground."

These decisions were confirmed in the case of *Rex v. Coke*.²

There a poor rate was imposed upon "a lighthouse, together with the duties and contribution money payable in respect of ships passing by the same;" the lighthouse was occupied by a servant of the owner, and was situated in the parish, but the duties were collected out of the parish; it was held that these duties did not constitute part of the annual profits of the house or land where the light was placed, and were not rateable to the poor.²

Holroyd, J., said, "This is a rate made not upon the lighthouse alone, but on the lighthouse together with the duties or contribution-money in respect of ships, hoys, and barques passing the same. I am of opinion

¹ Cowp. 583; Cald. 155, 351; S. C., Lofft, 77. ² *Rex v. Coke*, 5 B. & C. 797.

“ that the lighthouse is rateable for the sum at which it may
 “ be valued, but that the tolls and duties are not rateable.
 “ We cannot hold them to be rateable unless we overturn
 “ the cases of *Rex v. Rebowe*¹ and *Rex v. Tynemouth*,² and
 “ the principles upon which these cases have been decided,
 “ as well as others in which it has been held, that tolls,
 “ although not rateable *per se*, are rateable where they can
 “ be considered as money paid for the use and occupation
 “ of the land. The case of *Rex v. Rebowe* was very similar
 “ to the present. There the king by letters-patent granted
 “ to Sir Isaac Rebowe liberty to erect lighthouses at
 “ Harwich, and towards the maintenance of them certain
 “ duties and tolls were made payable by all ships passing
 “ or coming into that harbour. That was a franchise
 “ granted by the Crown; it differs from many others
 “ which are called so, but the privilege granted was a
 “ franchise. The power to erect lighthouses originally be-
 “ longed to the Lord High Admiral, and afterwards was
 “ granted to the Trinity House. What is the toll payable
 “ for? Not for any benefit received within the parish, for
 “ it is payable every time the ships pass the lighthouse,
 “ whether any benefit be received or not by the ships,—
 “ whether they pass by day when the lights are out, or
 “ whether they pass in the night when the lights are burn-
 “ ing. In *Rex v. Rebowe*, the rate was made upon the
 “ tolls and duties.” His lordship here quoted Lord
 Mansfield’s judgment, noted above: “And after taking
 “ time to consider, Lord Mansfield and all the judges were
 “ of opinion that Mr. Rebowe ought not to be rated for
 “ the tolls; he says, ‘the *property* is not in the parish.’
 “ By property he does not mean the lighthouse, but the
 “ tolls, which did not arise from any benefit received in
 “ the parish by the persons paying toll. He afterwards
 “ says, ‘The tolls are not locally situate in the parish, and
 “ ‘are not rateable there.’ If they were to be considered

¹ Const. 142, pl. 177; Cowp. 583;
 Nolan’s Poor Law, vol. i. p. 99.

² 12 East, 46.

“ as part of the money for which the lighthouse might be
 “ rated, they might have been rated under the denomina-
 “ tion of tolls. At a considerable interval of time after
 “ the decision of that case, came the case of *Rex v. Tyne-*
 “ *mouth*. . . . Now in this case the profits of the
 “ lighthouse arise from the tolls which are rated under the
 “ name of duties and contributions. I think, according to
 “ these two cases, we must decide that the tolls, not being
 “ received, and having no locality within the parish of
 “ Lydd, are not rateable.”

It has been shown above, that where the bed of a river is in permanent and beneficial occupation by means of moorings, &c., the owners thereof are liable to be rated in the parish in which the land so occupied is situated.¹ The question in all the decisions there considered was,—What can be said to constitute a permanent beneficial occupation? A similar principle applies where rivers have been entrusted by Acts of Parliament to companies or trustees for the purposes of improving the navigation. In such cases, unless the incorporating Act actually vests the soil in them, the proprietors have been held not rateable.²

Rivers and
Ferries.

The rateability of ferries requires to be fully noticed, since it was with reference to ferry tolls that the principle that tolls detached altogether from local real property are not rateable *per se*,³ was first laid down.

In the important case of *Rex v. Nicholson*,³ which has been already referred to, it was held, that the *lessee and occupier* of an ancient and exclusive ferry, not being an *inhabitant resident* within the township in which one of the termini of the ferry is situated, is *not liable* to be rated there for any share of the tolls of such ferry; for supposing a ferry to be real property, it is not such real property as

¹ *Cory v. Bristowe*, see *ante*, p. 614 *et seq.*

² *Rex v. Mersey and Irwell Navigation*, 9 B. & C. 95; *Rex v. Thomas*, 9 B. & C. 114; *Rex v. Aire and*

Calder Navigation, 9 B. & C. 820; 3 B. & Ad. 139; *Bruce v. Willis*, 11 A. & E. 463; 9 L. J., M. C. 43.

³ *Rex v. Nicholson*, 12 East, 330.

is mentioned in the statute 43 *Eliz. c. 2*, the occupancy of which subjects the party to the relief of the poor of the place. And all the cases where the parties have been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy) have been, where they at the same time occupied real visible property connected with such tolls in the place where they were rated.

So, too, in a case¹ decided on the same authority, it was held, that *the owner* of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is *not* rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground—the soil itself at the landing-places being the king's common highway, and the owner of the ferry having no property in or exclusive possession of it.

*Rex v.
Nicholson.*

In delivering judgment in *Rex v. Nicholson*,² Lord Ellenborough, C. J., said:—"There was a case of *Williams v. Jones*,³ argued in the last term, which, in principle, is the same as the present, and will be governed by it, unless the Court should hereafter see any special ground on which to distinguish it. The rate is here imposed on the *tolls* merely of the ferry, and the question is—Whether the proprietor of the ferry, who is not an inhabitant of the township in which he is rated, be liable to be rated for such tolls received by him there? And this being a question upon the construction of the statute 43 *Eliz. c. 2*, it is material to look to the words of it. By that statute, the parish officers, by consent of two justices of peace, are directed to raise a competent sum for the relief of the poor, by taxation of 'every *inhabitant*, parson, vicar, and others; 'and of every *occupier* of lands, houses, tithes impro-

¹ *Williams v. Jones*, 12 East, 346.

² 12 East, 341 *et seq.*

³ 12 East, 334.

“ ‘ puate, propriations of tithes, coal mines, or saleable
 “ ‘ underwoods in the said parish.’ Now *tolls* do not
 “ come within any one specification of occupancy de-
 “ scribed by the statute ; they are not lands nor houses,
 “ &c. If, therefore, the owner be taxable for them at all,
 “ it must be as an *inhabitant* of the parish out of which
 “ they arise ; but there is no case in which the word
 “ *inhabitant* in that statute has been held to mean any
 “ other than a resident within the parish. In the cases
 “ which have occurred of rating in respect of personal
 “ property, such as *The King v. Liverpool*, and *The King*
 “ *v. Collison*, mentioned in *The King v. Jones*,¹ residence
 “ was considered necessary to constitute inhabitancy.
 “ But we are reminded of cases where *tolls* arising from
 “ navigable canals, to which the tolls of a ferry are
 “ assimilated, have been held rateable, without any refer-
 “ ence to the question of inhabitancy ; and the *Wickham*
 “ *case* is much relied on—where a corporation was held
 “ rateable for market tolls ; but they were the lords of the
 “ soil where the market was held in respect of which they
 “ were rated for the tolls. In the case of *The King v.*
 “ *Cardington*,² the rate was specifically upon the sluices—
 “ on that which was local and visible property, and
 “ producing profit within the parish ; and all the cases
 “ where tolls have been held to be rateable, when they are
 “ examined, will be found to have proceeded on that
 “ ground. It was so in the case of *The Staffordshire and*
 “ *Worcestershire Canal*.³ The company were there rated
 “ for ‘ their basins, towing paths, and that part of their
 “ ‘ canal and the locks lying within Lower Mitton ; and
 “ ‘ for the tolls and duties arising therefrom due at Lower
 “ ‘ Mitton.’ There could be no doubt that the *basins*,
 “ *towing paths*, *canal*, and *locks* were local visible property
 “ there, and the *tolls and duties arising therefrom*, classed
 “ and connected as they are with the local visible property

¹ 8 East, 451—457.

³ 8 T. R. 340.

² Cowp. 581.

“rated, were considered as resulting from that local and
 “visible property. In all these cases, the tolls have
 “arisen from the use of the canal, which is local and
 “visible, being part of the land itself, lying within the
 “parish where the tolls have been rated. But there is no
 “case where tolls, detached altogether from local real
 “property, have been held to be rateable *per se*. When,
 “therefore, we are called upon to decide such a question
 “for the first time, I am always disposed to go to the
 “fountain head, which is the Act of the 43 *Eliz.*; and
 “looking at the words of that Act, I do not find any of
 “them which extend to rate any person not being an
 “inhabitant of the place, nor the occupier of any of the
 “specific kinds of property mentioned in the Act. And
 “not finding any description in the statute which applies
 “to the case of this appellant, I cannot hold him to be
 “rateable for these tolls.”

*Reg. v. North
 and South
 Shields Ferry
 Co.*

In *Reg. v. North and South Shields Ferry Company*,¹ a company was authorized² to maintain a ferry by boats between North and South Shields, across the Tyne; and to erect ferry houses, landing-places, &c. on either side. The boats passed from one to the other across the river; and no tolls could have been earned without the use of the landing-places, nor for such use without the transit. The company were rated to the poor on the north side, as occupiers of a “ferry landing and tolls,” in a sum including half the net value of the tolls. It was held, however, that the tolls could not be rated directly as being connected with real property occupied in the town-ship, and thus ceasing to be incorporeal, or indirectly as profits of land; but that the land, on the other hand, should not be taken at its value as land merely, but should be rated on an estimate of the rent which might be obtainable for it from its being available for earning tolls.

It was further held that the rateable value could not be

¹ 1 E. & B. 140; 22 L. J., M. O. S. 89; 17 J. P. 21.
 C. 9; 7 Rail. Cas. 849; 20 L. T., ² By 10 Geo. IV. c. 98.

ascertained by dividing the profits in proportion of the land occupied in the two townships, and the length of transit.¹

The right of fishery was not formerly rateable at common law, unless connected with the use of the land;² but now, by 37 & 38 *Vict. c. 54*,³ s. 6, it is enacted as follows:—

Fisheries.
—

1. Where any right of fowling, or of shooting, or of taking or killing game or rabbits, or of *fishing* (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case, if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase.

2. Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee

¹ Cf. as to ferries, Castle, pp. 193—197. Mr. Castle remarks that “in all these cases of ferries, the passengers, &c. appear to have been carried in boats worked by wind or steam, or by hand freely over the surface of the water. The cases where the ferry is worked by means of ropes or chains lying on the bed of the river, do not seem to have been brought before the Court. The distinction between the two seems to be similar to that between a carriage driving freely

“over a road, and a tramway car that travels along the rails laid down for that particular purpose; if this be so, the question of the rateability of a ferry so worked would probably be decided upon the same principle as the tramway cases:” page 196.

² See Castle, p. 167; *Rex v. Ellis*, 1 M. & S. 652.

³ An Act to amend the law respecting the liability and valuation of certain property for the purposes of rates. See Castle, pp. 328, 329.

thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

3. Subject to the foregoing provisions of this section, the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

4. For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

Canals.
Exemption of
in certain
cases.

Certain Canal Acts, passed at the time when such undertakings were chiefly begun, contained provisions partially exempting such canals, in so far that they made "the rateability of the lands taken for the canal independent of the profits of the undertaking generally, by enacting that such lands are to be rated as other lands in the parish."¹ And hence it was held,² that companies so exempted were not liable to be rated for the land used for the purposes of the canal according to its improved value, but in the same proportion as other lands lying near should be rated, and as the same lands would be rateable in case the same were the property of individuals in their natural capacity.

Value of adjoining lands,
how far to be
considered.

With regard to the question of the value of "the other lands lying round," it was decided in *Rex v. Monmouthshire Canal Co.*,³ that the canal was to be rated at the value which the adjacent lands bore at the time of the rate, and not at their value at the commencement of the undertaking, nor at that which they would have borne at the time if the canal had not been made, and their value thus considerably increased.

¹ Castle, p. 150; *Rex v. St. Peter the Great*, 5 B. & C. 473; *The King v. Regent's Canal*, 6 B. & C. 720; *Rex v. Chelmer and Blackwater Navigation*, 2 B. & Ald. 14; *Rex v.*

Grand Junction Canal, 1 B. & Ald. 289.

² *Ib.*; Castle, p. 154.

³ 3 A. & E. 619.

It appears, however, to be a moot point whether, in ascertaining the value of adjoining lands, where such land has been covered for the most part with buildings, the value of uncovered land should be taken, or whether the average value of the whole of the adjacent lands was to be the true criterion.¹ It has been held on the one hand by Lord Ellenborough in *Rea v. Grand Junction Canal*,² and Lord Campbell and Erle, J., in *Reg. v. Grand Junction Canal*,³ that the land should be rated as other lands would be, supposing them not to be applied to the purposes of the canal, but to have remained in the hands of individual farmers for ordinary agricultural purposes; and on the other by Cockburn, C. J., in *Reg. v. Glamorganshire Canal*,⁴ it was laid down that the true criterion is what a tenant from year to year would give for the adjoining land increased in value by buildings, together with the adjoining lands of other descriptions, the different lands being brought into hotchpot, so that the canal would be rated according to the aggregate value of the adjoining lands at the time the rate was made.⁵

Mr. Castle, however, points out,⁶ that in the cases of *Grand Junction Canal Co. v. Hemel Hempstead*, and *Grand Junction Canal Co. v. King's Langley*,⁷ the Court of Queen's Bench "followed the opinion of Lord Campbell "rather than of Cockburn, C. J." There the company, according to the provisions of 24 *Geo. III. c. 24, s. 19*, were to be rated to all taxes in respect of lands and grounds purchased or to be purchased, and all warehouses, or other buildings in the same proportion as other lands and buildings adjoining, &c. Land was purchased, a canal with towing paths, lock houses, &c., made, and subsequently a railway was made adjoining. It was held, that the lands occupied by the canal was to be rated in the same propor-

Grand Junction Canal v. Hemel Hempstead.

Grand Junction Canal v. King's Langley.

¹ Castle, p. 155.

² 1 B. & Ald. 289.

³ 7 W. R. 597.

⁴ 3 E. & E. 186; 29 L. J., M. C. 238.

⁵ See Castle, pp. 152—159.

⁶ Page 159.

⁷ L. R., 6 Q. B. 173; 40 L. J.,

M. C. 25; 24 L. T. 228.

tion as open land near, the value of which might be increased by circumstances, and the buildings of the company as the buildings lying near. It was further decided, that the land occupied by the canal lying near the railway was not to be rated as land improved in value by the railway; and that the rateable value of the canal was not affected by the company carrying on the business of carriers:—Mellor, J., remarked: “It is true that Cockburn, C. J., in *Reg. v. Glamorganshire Canal*,¹ seems to have disapproved of the decision of Lord Campbell, C. J., and Erle, J., in *Reg. v. Grand Junction Canal*;² but I think that there is a distinction between the two cases. I do not think that Lord Campbell, C. J., and Erle, J., intended to say that the land occupied by the canal was always to be rated at the value of purely agricultural land, which Cockburn, C. J., in *Reg. v. Glamorganshire Canal*, appears to have thought they intended, but at the increased value of surrounding land as determined from time to time by circumstances. If the land lying near becomes of more value by a new mode of cultivation being adopted, or by a different use being made of it, as being used as a market garden, or by buildings being erected in the neighbourhood, then the rateable value of the canal will be determined by the increased rateable value of the land lying near.”

The principle laid down in the decisions of *Grand Junction Canal Co. v. Hemel Hempstead*,³ and *Reg. v. Glamorganshire Canal Co.*,⁴ was followed in the late case of *Regent's Canal Co. v. St. Pancras Assessment Committee*.⁵

*Regent's Canal
v. St. Pancras.*

There the Canal Company's Act provided that the lands of the company, whether covered with water or not, and also all dwelling-houses, wharves, warehouses, lock-houses, and other houses of the company, should be rateable—the lands according to their quantity and

¹ 3 E. & E. 186; 29 L. J., M. C. 238; 2 L. T. 604.

² 7 W. R. 597.

³ L. R., 6 Q. B. 173,

⁴ 3 E. & E. 186; 29 L. J., M. C. 238.

⁵ 3 Q. B. Div. 73.

quality, and the dwelling-houses, &c., according to the nature and respective uses, dimensions, and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality, and dwelling-houses, &c., of a like and similar size, nature, dimension or description in the respective parishes where the same should be situate, were, or should be, assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee sought to assess the canal and towing path on the following principle. They assumed the area occupied thereby to be covered by buildings similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and then took a proportionate part of such rateable value as representing the rateable value of the lands so covered as distinguished from the buildings:—Held, that the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances, and that the mode of assessment proposed by the assessment committee was therefore incorrect.

It was formerly held, that canal tolls were rateable *per se*, and not as part of the profits arising from the occupation of the soil, and, therefore, were rateable in the parish where they became due, that is, where the voyage terminated.¹

Canal tolls were originally held rateable *per se*;

This rule was slightly modified by the decision in the case of *Rex v. Leeds and Liverpool Canal*,² where goods were carried along two different lines of canal, one of which was exempted by statute from being rated in respect of tolls, and the other not, and the voyage might happen to end in the unexempted line where the tolls became due. The Court, though agreeing with the prin-

¹ *Rex v. Cardington*, 12 Cowp. 581; *Rex v. Page*, 4 T. R. 543; 1 Nolan's Poor, p. 107, S. C.; *Rex v. Aire and Calder Navigation*, 2 T. R. 660; *Rex v. Staffordshire and Worcestershire Canal*, 8 T. R. 340; *Rex*

v. Leeds and Liverpool Canal, 5 East, 325; cf. Woolrych, Law of Water, p. 329; Castle, Law of Rating, pp. 205 *et seq.*, 394 *et seq.*

² 5 East, 326.

ciple that the toll only becomes due where the voyage ends, and can only be taxable there, if at all,¹ held, that the canal company should not be rated for more than such proportion as accrued for carriage along the unexempted part—i. e., for so much per ton per mile as the goods were carried along the unexempted part; and that as the Act directed tolls to be exempt from taxes other than such as the land used for the navigation would be subject to, that goes to exempt the tolls *quà* tolls altogether from being rated, leaving the land as before.

but now are
not so rate-
able since.

Rex v.
Nicholson.

The case, however, of *Rex v. Nicholson*,² above mentioned, where it was decided that tolls detached altogether from local real property are not rateable *per se*, caused a complete reversal of the former principles on the subject, as will be seen by the consideration of *Rex v. Milton*,³ and *Rex v. Palmer*,⁴ where the decisions were carefully reviewed.

Rex v. Milton.

In *The King v. Milton*,⁵ certain tonnage dues were payable in respect of goods carried along a line of river navigation, extending through several parishes, which were landed at a wharf locally situate within the parish of B.; and it was held that a rate on the proprietor of those dues for their whole amount in the parish of B., stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within the parish of B., but as a rate upon the parts of the river situate as well within as without the parish, and that it could not therefore be supported. It was also held that 41 *Geo. III. c. 23, s. 1*, does not give the Court of King's Bench the power of amending a poor rate.

Bayley, J., in his judgment,⁶ reviewed all the decisions on the rateability of tolls: "Since the case of *The King v. Nicholson*, the Court have held themselves bound to

¹ See judgment of Lord Ellenborough, 5 East, 330.

² 12 East, 330; see *ante*, p. 622.

³ 3 B. & Ald. 112.

⁴ 1 B. & C. 546; cf. *Rex v. Calder*

and *Hebble Navigation*, 1 B. & Ad. 263.

⁵ 3 B. & Ald. 112.

⁶ Page 116.

“ see clearly that the property rated comes within the words of the 43 *Eliz.*, by which the rate is directed to be ‘by taxation of every inhabitant, passenger, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods in the parish.’ Now the party here, not being an inhabitant, must be brought within some of the other words, and the only other words applicable to this case are ‘occupier of land.’ Now in *The King v. Tynemouth*, it was decided that the tolls of a lighthouse, situate in the parish of Tynemouth, but collected in the several ports at which the vessel, passing along the coast, afterwards arrived, were not rateable quā tolls in the township, and the rate was held to be bad. In *The King v. Nicholson* the party was rated for the tolls of a ferry; he was not an inhabitant, nor did he occupy any lands or tenements, for he was not entitled to the land on either side of the river over which the ferry extended. The Court then considered the cases of *The King v. Cardington*,¹ and *The King v. Aire and Calder Navigation*.² The former case does not fall within the principle laid down in *The King v. Nicholson*; it was a rate for toll of a sluice, and the party was the occupier of the sluice within the parish in which the rate was imposed. The sluice being landed property, the party was properly rated for the tolls yielded by the sluice within the parish. The cases of *Rex v. Aire and Calder Navigation* and *Rex v. Page*³ certainly do not admit of that distinction. Those decisions, however, were expressly overruled by this Court in the case to which I have alluded. In *Rex v. Staffordshire Canal*,⁴ the company were rated for their basin and towing-paths, and that part of their canal and locks lying within Lower Mitton, and for the tolls and duties arising therefrom due at Lower Mitton; so that it

¹ Cowp. p. 581.

² 2 T. R. 560.

³ 4 T. R. 543.

⁴ 8 T. R. 340.

“ appeared on the rate itself that, though it was nomi-
“ nally a rate upon tolls, yet it was on such tolls as
“ arose from rateable property within the parish. In
“ *The King v. Sir Archibald Macdonald*, the rate was for
“ the Rochdale Canal Lock Tunnel dues or rates. Now
“ if those dues or rates had arisen from property partly
“ within the parish and partly without, it would have
“ been like the present case. The only dues which the
“ party was entitled to receive in that case were dues in
“ respect of vessels passing through the lock, *which lock*
“ *lay within the parish*; and, therefore, all the tolls and
“ dues there arose from what may be called parish pro-
“ perty. The rate in this case is for tonnage dues, and it
“ would be a good rate, provided it could be shown that
“ the tonnage arose wholly from the use of rateable pro-
“ perty within the parish. It is stated, however, that the
“ canal passes through several parishes. The tolls, there-
“ fore, which are collected for goods landed at the wharf
“ in the parish of Bengworth, are payable to the pro-
“ prietor as a compensation for the use of the whole line
“ of the canal through which the goods pass, and not
“ merely for the use of that part of the canal which lies
“ within the parish of Bengworth. It is a rate, therefore,
“ upon profits arising partly within and partly without the
“ parish, and, upon that ground, I think that the rate cannot
“ be supported; and if it cannot, the case of *Rex v. The Mayor*
“ *of Bath*¹ is an authority to show that the rate must be
“ quashed. In that case the rate was upon certain springs
“ and reservoirs; and the question was, whether the springs
“ and reservoirs were rateable property, and the Court
“ decided that they were; but the whole of the rate
“ having been imposed on one parish, the Court were of
“ opinion that it ought to have been imposed on different
“ parishes, and that the parish in which the reservoir was
“ situate ought to have been assessed for the value of that,
“ and that the parishes through which the pipes con-

¹ 14 East, 609.

“veying the water passed ought to have been assessed for the value of the profits arising therefrom. It seems to me, therefore, that this rate having been imposed on property partly within and partly without the parish, is bad, and that it is not a mere objection to the quantum of the rate.”

This decision was confirmed by that of *Rex v. Palmer*,¹ *Rex v. Palmer.* which decided that the proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish used for the purposes of the navigation; and, therefore, that where the proprietors of such a navigation, which extended through different parishes, were rated in one for the entire amount of their tolls, the Court of King’s Bench held that the rate could not be supported.

The principles here laid down now appear to apply equally to cases where the payments are made irrespective of distance.²

In *Rex v. Cardington*,³ mentioned above, the grantee of the right of navigation of the river Ouse between Erith and Bedford, was held rateable to the poor in the parish of Cardington, in respect of the tolls arising from a sluice erected there, though he himself resided elsewhere, and the tolls were collected in another parish. Commenting on this case in *Rex v. Nicholson*,⁴ Lord Ellenborough said: “The rate was specifically upon the sluices, on that which was local and visible property, and producing profit within the parish; and all the cases where tolls have been held rateable, when they are examined, will be found to have proceeded on that ground.”

This principle appears to hold good with regard to lock dues which have been decided “to be a local earning, and

¹ 1 B. & C. 546.

² See Castle, Law of Rating, p. 399; *Rex v. Oxford Canal*, 4 B. & C. 74; *Rex v. Oxford Canal*, 10

B. & C. 113; *Reg. v. Kingswinford*, 7 B. & C. 236.

³ 2 Cowp. 581.

⁴ 12 East, 341.

Rex v. Macdonald.

“to be locally rateable.”¹ In *Rex v. Macdonald*,² this question came under consideration.

Where an Act of Parliament empowered the Duke of Bridgewater to erect a lock upon the Rochdale Canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at Manchester, which were sacrificed for the public benefit in that navigation:—it was held that a poor’s rate on his trustees and occupiers of the “Rochdale canal, lock, “tunnel dues or rates” (which rates or dues are only other names for the lock rated therewith) is good, though the trustees were found not to be inhabitants of the township, for which the rate was made.

Rex v. Lower Mitton.

A more recent decision is that of *Rex v. Lower Mitton*,³ where lock dues were expressly held locally rateable.

There a canal company were empowered by their Act to take lock dues at *two* of their locks in lieu of making a mileage charge, as they were entitled to, of 11½*d.* a ton; and the Court held, that the annual profits of the locks were to be considered for the purposes of the poor rate to have been produced in that parish where the locks were situate, and not in the several parishes through which the canal passed.

Trade profits.

“Trade profits,” says Mr. Castle,⁴ “unlike stock-in-trade, never were rateable *per se*, even where personal property was rated. But in the valuation of property, its capability for earning profits of trade is an element of value that can never be entirely eliminated: . . . hence when they improve the value of the occupation they must be taken into account.”⁵

The trade profits of a canal company arise from their duties as carriers. In *Rex v. Trustees of Duke of Bridge-*

¹ See Castle, p. 400 *et seq.*, 479.

² 12 East, 324.

³ 9 B. & C. 810; 4 M. & R. 711.

⁴ Page 227. He points out that canals differ from railways on this

point, in that the latter have a monopoly of carrying traffic, while the former have to compete with the public.

⁵ *Ib.* 230.

water,¹ it was held that the proprietors of a canal were rateable for the sum at which it would let, and not for their gross receipts *minus* their expenses. "I lay out of consideration," said Bayley, J., "the fact of the trustees being carriers, because their occupation only is to be considered. The profits of carrying goods are the profits of their trade. The tonnage is the profit of the land occupied by them. The other sums received by them constitute the profits of their trade."

With regard to deductions, it may be noted that while the expenses of collecting tolls, of repairs of banks, and of supplying water ("all expenses incurred in repairing that part of the canal in that parish"), must be deducted from the sum paid for poor rate,² on the other hand, it has been held by Lord Campbell, C. J., in *Reg. v. Coventry Canal*,³ that the expenses of maintaining locks do not come under the head of local expenses.

"Where there is a profitable occupation of a public highway by private persons or companies, the occupiers are rateable, though they have no property in the soil. But where a profit is made, it is not rateable unless it is an incident of the occupation of land, even if the person receiving such profit is the owner of the soil."⁴

Hence water companies are rateable for the land occupied by their pipes, mains,⁵ and reservoirs;⁶ and the Metropolitan Board of Works were held rateable for their engine-houses, pumping stations, and wharfs, though not for their sewers, which are not the subject of beneficial occupation.⁷

¹ 9 B. & C. 68; 7 L. J., O. S., M. C. 81.

² 10 B. & C. 113; 5 M. & R. 100.

³ 1 E. & E. 572; 28 L. J., M. C. 102. In contradiction apparently to *Rex v. Lower Mitton*, 9 B. & C. 68; and *Rex v. Macdonald*, 12 East, 324; cf. on the subject, Castle, pp. 478—481.

⁴ Castle, p. 176.

⁵ *Atkins v. Davis*, Cald. 325; *Rex v. Bath*, 14 East, 609; *Rex v. Chelsea Waterworks*, 5 B. & Ald. 156; 2 L. J., M. C. 98; *Rex v. Rochdale Waterworks*, 1 M. & S. 634; *Reg. v. West Middlesex Waterworks*, 1 E. & E. 716; 20 L. J., M. C. 135.

⁶ *Rex v. Bath*, 14 East, 609.

⁷ L. R., 4 Q. B. 15; 9 B. & S. 937; 38 L. J., M. C. 24.

Water companies

rateable for land occupied by their works, &c.

In *Talargoch Mining Co. v. St. Asaph Union*,¹ where the owners of a lead mine diverted a stream from its natural course into an artificial watercourse passing to the machinery connected with the mine, paying the owners of the stream for its diversion, and paying small sums for the occupation of the land; it was held that they were rateable in respect of the occupation of the watercourse at the full value of the land enhanced by its capacity for carrying water, and that the stream was not exempt by its connection with a lead mine, which is not rateable under 43 *Eliz. c. 2*.

Value of land enhanced by a spring.

Land, the value of which is enhanced by a spring, has been held rateable to the poor at such improved value, although the New River Company, the owners and occupiers of the spring, received none of the profits in the parish, nor did any part of such profits become due in the parish where the land lay.² Bayley, J., said: "I think it is clear that the company are liable to be rated for the spring, which is part of the produce of the land. The company have the means of carrying this produce to market, where it affords a beneficial return."

Rex v. Bath.

The decision of *Rex v. Bath*³ is instructive as to the question of rateability where reservoirs and other apparatus for conveying water are outside a parish.

The statute 6 *Geo. III. c. 70*, for better supplying the inhabitants of Bath with water, reciting that there were springs of water in the neighbourhood belonging to the corporation, enacts that they shall have power and authority to cause the water to be conveyed from such springs to the

¹ L. R., 3 Q. B. 478; 9 B. & S. 210; 37 L. J., M. C. 149; cf. *Rex v. Bilston*, 5 B. & C. 851, where the owner and occupier of an ironstone mine, who erected an engine for the purpose of drawing the water from the mine, using it for no other purpose, was held *not* rateable for the engine.

This decision seems to be much questioned; see *Talargoch Mining*

Company v. St. Asaph Union, L. R., 3 Q. B. 478; and *Reg. v. Metropolitan Board of Works*, L. R., 3 Q. B. 15; see Castle, p. 437.

² *Rex v. New River Co.*, 1 M. & S. 503. Cf. *Rex v. Miller*, 3 Cowp. 619, where the spring was a mineral spring consumed on the ground, and not conveyed to a distance.

³ 14 East, 609.

city, and gives them authority to enter upon and break up the soil of any public highway or waste, and the soil of any private grounds within two miles of the city, and the soil or pavement of any street within the city, in order to drain and collect the water of the said springs, and to make reservoirs, fresh conduits, waterhouses, and engines necessary for keeping and for distributing the water, &c., and to lay underground aqueducts and pipes for the same purpose; and it vests the right and property of all these in the corporation:—Held, that in addition to the springs, the corporation was liable to be rated for the reservoirs made by them in the parishes of Lydecomb and Widcomb under the Act, as for land occupied by them, which reservoirs, by means of aqueducts and pipes laid underground, partly in the same parish and through the parish of St. James into the parish of St. Peter and St. Paul in Bath for the supply of the city, produced to the corporation a clear annual profit of 600%. But that the corporation were not rateable for the whole of the entire profit in the first-mentioned parish, in which the springs were first collected into the reservoirs, a proportion of such entire profit accruing to them from the underground aqueducts and pipes laid into the soil of the other parishes, in respect of which they were to be considered as occupiers of land yielding annual profit in these parishes; and, therefore, a rate upon the entire profits arising out of all the parishes, made on the corporation in the first-mentioned parish, was held bad.¹

The above case, it will be seen, raises the consideration of the mode of rating a whole system of waterworks extending through several parishes. This point has now been satisfactorily settled by the decision in *Reg. v. Mile End Old Town*.²

Where works extend through several parishes.

In that case, the works of a water company extended into several parishes, and consisted of two portions, one of which, being the service pipes which delivered the water

Reg. v. Mile End Old Town.

¹ *Rex v. Bath*, 14 East, 609.

² 10 Q. B. 208.; 16 L. J., M. C. 184.

to the consumer, was directly productive of profit; and the other, consisting of reservoirs, buildings, &c., indirectly conduced to such production. In some parishes the company had no works, but service pipes. The rateable value (for the purposes of poor rate) of the entire works was 30,800*l*. The rateable value of the reservoirs, buildings, &c., valued as land and buildings, deriving additional value from their capacity of being applied to the objects of a water company, was 6,500*l*. It was held that the rateable value ought to be apportioned as follows among the several parishes:—The rateable value of the reservoirs, buildings, &c., valued as above, to be first deducted from the total rateable value, and distributed among the parishes in which this portion of the works was situate, according to the extent of such works in each parish; and the residue of the rateable value to be apportioned among the parishes containing the service pipes, in the ratio of the net profits produced in each of those parishes.

Lord Denman, C. J., in delivering judgment,¹ pointed out that an analogous course had been adopted for railways,² and for gas companies;³ and that in *Rex v. The New River Company*,⁴ the spring which indirectly conduced to the ultimate profit, by water rate, was held rateable in the parish where it was situate; the *quantum* of such rate being left for the sessions. He also stated that an apportionment, according to the gross receipts, is in accordance with the decisions which have apportioned the sum of rateable value from a railway or canal, according to the length of the line in each parish.⁵ “Where the “profit arises,” said his lordship,⁶ “from transit, the line “of the canal or railway is directly productive of the “profit, and the reservoirs, warehouses, stations, &c.

¹ 10 Q. B. 218.

² *Reg. v. London and South Western Rail. Co.*, 1 Q. B. 558; *Reg. v. Grand Junction Railway*, 4 Q. B. 18.

³ *Reg. v. Cambridge Gas Light*

Co., 8 A. & E. 73.

⁴ 1 M. & S. 503.

⁵ *Rex v. Kingswinford*, 7 B. & C. 236; *Rex v. Woking*, 4 A. & E. 40.

⁶ 10 Q. B. 221.

“ indirectly conduce to such production. Each portion of
 “ the line earns an aliquot portion of the profit ; and, if
 “ the equal portions of one line carrying at one rate could
 “ be conceived to be let separately, no one portion would be
 “ let at a higher rate than the other ; and an apportion-
 “ ment of a sum of rateable value, according to the length
 “ of line in each parish, is according to the rent to be
 “ expected for that part of the line. In the case of water
 “ companies, where the profit arises from the delivery of
 “ the water at a given place, the previous transit being
 “ immaterial to the consumer, the service pipes imme-
 “ diately produce the profit, and the agency by which the
 “ water reaches those pipes indirectly conduces to such
 “ production. If the service pipes in each parish could be
 “ let separately, the water being assumed to be sold at the
 “ same price throughout, the criterion of the rent would
 “ be found in the gross receipts, which would depend on
 “ the number and diameter and level of the service pipes
 “ in each parish ; and an apportionment according to the
 “ gross receipts in each district would be according to the
 “ rent to be expected from the part of the rateable subject
 “ situate in such district.”

This decision was followed in *Reg. v. West Middlesex*,¹ *Reg. v. West Middlesex.*
 where the cases on the subject were fully reviewed.

There a waterworks company was empowered by Act of Parliament to construct works and lay down mains and pipes under certain highways, and to supply certain parishes with water. In the parish of Hampton, not being one of these parishes, the company erected engine houses and other buildings, containing apparatus for raising water from the Thames, and laid down a main under the highway, which ran about a mile through Hampton, and conveyed the whole of the water supplied by the company to reservoirs in another parish, whence the water was distributed by other mains and pipes to the customers in the several parishes. The company derived no direct profit whatever in Hampton, and had no free-

¹ 28 L. J., M. C. 135.

hold or leasehold interest in the soil of the highway. It was held by the Court, that the company was rateable to the poor rate for the mains, being fixed capital vested in land, the company being in possession of the mains buried in the soil, and so, *de facto*, in occupation of the space in the soil filled by the mains for a purpose beneficial in itself; and that, as to the principle on which the company was to be rated in Hampton, in respect of the plant, engine house, buildings, wharfs, mains, lands, and premises, that it was to be rated as for so much land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as those of a water company; such additional value being derived from an increase of demand beyond supply, according to the principle regulating exchangeable value, and not by reference to receipts earned in another parish, beyond assuming that they were sufficient to pay all outgoings, including profits on capital.

Wightman, J., who delivered the judgment of the Court to the above effect, after stating the two questions at issue, pointed out, with regard to the first, that "The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute:" and with respect to the second, as to the rating of the machinery, &c., he quoted the decision in the *Mile End Old Town case*, that it is to be rated as for "mere land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as that of a water company."¹

¹ The learned judge then added:
 "There appears to me, however,
 "so much difficulty in applying
 "the parochial principle of rating
 "by estimating the rent which a
 "tenant would give for the sub-
 "ject-matter, in such a case as

"the present, as practically to
 "amount nearly, if not entirely, to
 "an impossibility of doing so satis-
 "factorily. I may also add that
 "I am not quite satisfied that the
 "distinction which has been taken
 "between direct and indirect

Where under the Valuation of Property (Metropolis) Act (32 & 33 *Vict. c. 67*),¹ s. 43, the mains and pipes of a waterworks company have been inserted in the quinquennial valuation list, a supplemental valuation list under sects. 46, 47 may be made during such period of five years, so as to include an increase in the value of the same mains by reason of their having been connected with newly-built houses since the date of the last valuation.²

Rateability
under 32 & 33
Vict. c. 67.

It remains to notice the rateability of bodies such as urban authorities and the like who purchase waterworks, or are empowered to provide them for special classes,³ the

Urban autho-
rities and
other public
bodies supply-
ing water

“sources of profit, as applied to
“the mains and pipes of a water
“company running through diffe-
“rent parishes, is well founded,
“and more especially in cases
“where the mains only belong
“to the company, and not the
“service pipes. Indeed, the whole
“subject matter appears to me
“to be involved in so much diffi-
“culty and uncertainty, that I
“cannot but hope that the Legis-
“lature may interfere and make
“some provision adapted to the
“rating of the property of such
“companies as that in question,
“and which may declare the
“principle upon which such com-
“panies are to be rated, and
“establish some uniform and
“practicable mode of carrying
“that principle into effect.”

¹ An Act to provide for uniformity in the assessment of rateable property in the Metropolis. By sect. 43, the valuation list, as approved by the Assessment Committee, shall come into force at the beginning of the year, commencing on the 6th of April succeeding that to which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned.

By sect. 46, every valuation list shall be revised in manner directed by this Act; and such revision, in every period of five years, shall be

conducted as follows:—

1. In each of the first four years of such period, a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations.
2. In the fifth year of every such period, the overseers shall make a new valuation list.

By sect. 47, if in the course of any year the value of any hereditament is increased by the addition thereto of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:—

1. The overseers of the parish in which such hereditament is situate may . . . send to the Assessment Committee a provisional list containing the gross and rateable value, as so increased or reduced, of such hereditament.

² *Reg. v. New River Co.*, L. R., 4 Q. B. Div. 309.

³ Cf. *ante*, Chap. V., p. 326; Castle, *Law of Rating*, p. 376 *et seq.*

rated
formerly as
private under-
takings, but
now only
with refer-
ence to the
actual profits
earned.

question in these cases being whether the fact of their acting expressly on behalf of the public entitles them to any exemption, or whether they are liable to be rated as private undertakers or bodies of adventurers.

In the cases of *The Queen v. Churchwardens of Longwood*,¹ *The Queen v. Kentmere*,² and *Reg. v. Township of Longwood*,³ where certain commissioners were empowered by the provisions of private Acts to supply townships with water, the latter view appears to have been taken—viz. that they should be rated as if the works had been a private undertaking: in the two cases about to be noticed, however, a different decision was arrived at.

*Mayor of
Liverpool v.
Wavertree.*

*The Mayor of Liverpool v. Overseers of Wavertree*⁴ was a case in the Court of Queen's Bench stated under 12 & 13 Vict. c. 45, s. 11. It appeared that by certain statutes the appellants were empowered to supply water for domestic and other purposes within certain limits, including therein the borough of Liverpool. Pursuant to their statutory powers they maintained waterworks in the township of Wavertree. By *Liverpool Corporation Waterworks Act*, 1862,⁵ the corporation of Liverpool were to estimate and fix the amount of money necessary for defraying the costs, charges, and expenses payable out of the Liverpool water account for the year then current, and were to fix the rate in the pound at which the domestic water rent was to be charged at such amount as, regard being had to the several sources of revenue, would be sufficient in the aggregate to meet the estimated expenses payable out of the water account for the current year. The corporation were limited by the said Act from receiving any more money from the consumers than was requisite to pay the above-mentioned expenses, and in this respect their income differed from that of an ordinary trading company, inasmuch as it did not necessarily

¹ 13 Q. B. 116; 18 L. J., M. C. 65.

² 17 Q. B. 551; 21 L. J., M. C. 13.

³ 17 Q. B. 871; 21 L. J., M. C. 215.

⁴ 2 Ex. Div. 55, note 1.

⁵ 25 & 26 Vict. c. cvii, s. 59.

represent the full value of the use and enjoyment of the water to the consumers. One of the questions for the opinion of the Court was whether, in arriving at the gross annual value of the appellants' waterworks, the respondents ought to ascertain the gross receipts which the appellants might derive if they were a trading company earning a profit by water supply, and then make the statutory and proper deductions from the figure so obtained, or whether they were limited to the actual receipt.

Blackburn, J. (with whom Lush, J., concurred), said :—
 “ I think it clear that the appellants are right. The
 “ whole question turns on the rule given by the Parochial
 “ Assessment Act, which says the occupier is rateable at
 “ what a tenant from year to year will give as the rent,
 “ who takes the land subject to the same restrictions as
 “ those under which the appellants hold it. Now the
 “ tenant would only give such a rent as the restrictions
 “ imposed by statute would enable him to earn, and the
 “ rateable value is to be based upon that rent.”

This principle was followed in the case of *The City of Worcester v. Droitwich Poor Law Union*,¹ where the local board of W. erected and occupied works for the purpose of supplying the inhabitants thereof with water, the works being situate in the parish of C. In order to benefit the inhabitants of W., the local board made the scale of charges so low as to leave a profit far less than would have accrued to a company carrying on the works as a commercial undertaking. In adopting the scale of charges above mentioned the local board intended to carry out those provisions of *The Public Health Act*, 1848, the object of which was to insure a supply of water at a low price for sanitary purposes. The assessment committee of the D. union, within which the parish of C. was situate, by a valuation list assessed the local board at a rateable

*City of Worcester v.
Droitwich
Poor Law
Union.*

¹ 2 Exch. Div. 49.

value of 1,400*l.*, based upon the amount which might have been earned by a trading company carrying on the waterworks for their own benefit; the local board, however, claimed to be assessed at a rateable value of 540*l.*, based upon the profit actually earned by them.

It was held, affirming the judgment of the Court of Appeal from the inferior Courts, that the assessment of 1,400*l.* was wrong, and that the local board were liable to be assessed at 540*l.* only; for under the provisions of *The Public Health Act*, 1848, they could not make rates of an amount more than sufficient to enable them to maintain the waterworks, and they could be lawfully assessed only with reference to the profit actually earned.

"The question in this case," said Cleasby, B.,¹ in giving the judgment of the Court of Appeal from inferior Courts, "is not the rateability of a public body in respect of premises occupied by them for public purposes; that question has been for some time settled;² and it is not disputed that the appellants, who are the local board of health of Worcester, are liable to be rated in respect of waterworks erected and occupied by them for the purpose of supplying the inhabitants with water. The question is, whether the rateable occupation is to be measured by the profits actually derived from the occupation, or by the profits which might be derived from it by a person or a company who occupied the works solely for the purposes of profit; the fact being that the corporation having in view the benefit of the inhabitants, have made the scale of rates so low as to leave a profit only of 600*l.* upon the rates actually received after deducting the expenses connected with the providing the water, collection, &c., upon which amount they contend they ought to be rated; whereas the respondents contend that a trading company with the same

¹ 2 Ex. Div. 57.

² See, as to this, *Mersey Docks v. Cameron*, 11 H. L. Cas. 443; 35

L. J., M. C. 1; *Jones v. Mersey Docks*, Ib.

“ powers of rating might have realized a net profit of
“ 1,750*l.*, on which amount they say the rate ought to have
“ been made.

“ It seems to us that the respondents cannot maintain
“ the rate which they contend for; and that the restric-
“ tions which are put by law upon a public body as to the
“ profits derivable from the occupation of waterworks or
“ gasworks, or other property of that description, must be
“ regarded in considering the profitable occupation by that
“ body.”

This decision was affirmed in the Court of Appeal, Mellish, L. J., who delivered the judgment of the Court, saying:¹ “ It has been held by the Divisional Court of
“ Appeal, that the contention of the corporation is right,
“ and we are of opinion that their decision ought to be
“ affirmed. There are two questions to be considered:
“ first, are the corporation, according to the true construc-
“ tion of the Public Health Act, prevented from charging
“ for the use of the water a larger sum than the sum they
“ actually require for the maintenance and repair of the
“ waterworks? and, secondly, if they are, can they be
“ rated as occupiers in respect of profit which the law does
“ not allow them to earn? Now, with respect to the first
“ question, we think that the corporation, in making a
“ water rate under sect. 93 of the Public Health Act, are
“ bound to make an estimate of the sum they require for
“ the maintenance of their waterworks, and cannot legally
“ levy a larger sum by a water rate than the sum they
“ require. . . . The question then is, whether, in
“ applying the rule given by the Parochial Assessment
“ Act, the Court is to consider what rent a tenant from
“ year to year would give for the reservoir and waterworks,
“ who was subject to the same restrictions the corporation
“ are subject to, or what rent a tenant from year to year
“ would give who was subject to no such restriction; and
“ we are of opinion that the hypothetical tenant is to be a

¹ 2 Ex. Div. 69.

“tenant subject to the restrictions. The case of *Corporation of Liverpool v. Overseers of Wavertree*, is directly in point, and we are of opinion that case was correctly decided. . . . An occupier of land is not rateable in respect of the whole profit derived from the land, but only in respect of the profit which he himself derives from the land. . . . If the waterworks were transferred to a tenant, who was under no restriction as to the price he charged for water, the rateable value of the waterworks would be increased, but there would be a corresponding diminution of the rateable value of the premises supplied with the water. We may also observe that the reservoir by itself, without the power of connecting the reservoir with the houses by pipes running through the streets, is probably worth nothing, and certainly is not worth 651*l.* a year; and it is the same Act of Parliament which gives the power to lay the pipes, and therefore creates the value of the reservoir, which contains the restrictions on the amount of profit which the occupiers of the reservoir can earn. Even in the case of the reservoirs of public companies established by Act of Parliament to supply towns with water, in estimating the rateable value of the reservoirs, the Court only considers the amount of profit which the terms of their Act enable the company to earn, not the profits which the company might earn if Parliament had enabled the company to establish waterworks without restriction as to the price to be charged to consumers.”

*Bridges and
bridge tolls.*

Bridges in
different
parishes.

The principle that profits must be rated where they are earned, which has been noted above in the case of docks,¹ applies as well to bridges, with regard to which the parochial principle also holds good.²

Where the proprietors of Hammersmith Bridge had land on both sides of the river, on which they erected

¹ *Reg. v. Bristol Dock Co.*, 10 L. J., M. C. 105.

² See Castle, 415 *et seq.*

piers and abutments, but took the tolls on one side only, it was held that they were rateable for the lands on both sides, which were used by the proprietors for the purpose of passage over the Thames, in respect of which they received tolls.¹

Similarly, the owner of a bridge resting on piles driven into the soil, one end of which was in the parish of A., and the other in the parish of B., where the toll-house was situated, was held rateable for an occupation of land in A. *pro rata*, though the road over the bridge was repaired by other persons.² There the tolls had been let by parol at a yearly rent; and Lord Denman, C. J., after pointing out that the case was almost identical with that of *Rex v. Barnes*, said: "Assuming then that the tolls are claimable in respect of the ownership of the land, there is no evidence here that the land *eo nomine* is professed to be demised at all; there is nothing to show that at this moment the marquis is not in the possession of the land for doing the repairs,—indeed for every purpose consistent with the bare collection of the tolls by Everett at the toll-house. On the other hand, though there is an agreement for the demise of the tolls *eo nomine*, yet, as by their nature they can only pass by deed, no interest at law has passed out of the marquis, who must therefore be still considered in possession of them, his intended tenant being in truth only his bailiff for collecting them." The marquis was therefore held rateable in respect of his beneficial occupation.

The rateability of bridge tolls came again under consideration in *Reg. v. Hammersmith Bridge Co.*,³ where it was decided that a rate is to be apportioned between two parishes, "according to the length of the bridge in each parish." In this case it was argued that the tolls should be distributed between the bridge proper and its

Reg. v. Hammersmith Bridge Co.

¹ *Rex v. Barnes*, 1 B. & Ad. 113; 8 L. J., O. S., M. C. 115.

³ 18 L. J., M. C. 85; 15 Q. B. 369; 3 New Sess. Cas. 424; 13 J.

² *Reg. v. Salisbury, Marquis of*, 3 N. & P. 476, Q. B.

P. 103. See Castle, p. 435.

road approaches, but the Court declined to consider this reasoning. "The approaches," said Lord Denman, C. J., "stand in the same relation to the bridge as stations and warehouses to railways, reservoirs and wharves to canals, aqueducts and mains to water supplies, gasometers and mains to gas burners; and the principle for dividing the direct from the indirect sources of profit, for rating the indirect sources, and for apportioning the residuary net rateable value among the districts in which the direct source was situate, was explained in *Reg. v. Mile End Old Town*."¹

Where the revenue of a bridge company, over and above the working expenses, was raised from tolls, but was wholly absorbed in the payment of mortgage debts, leaving nothing by way of interest for the shareholders, though there was a provision for paying them off (if the tolls were sufficient), when the tolls should cease, the company were nevertheless held to be rateable.² Where, in such a case, money is raised for the construction of an undertaking, so as to cause a debt, the interest of which is paid for out of the profits, such interest is not allowed as a deduction.³

¹ 10 Q. B. 208. See *ante*, p. 828; 1 P. & D. 603. See Castle, p. 373.

² *Reg. v. Blackfriars Bridge Co.*, 8 L. J., M. C. 29; 9 A. & E.

³ *Ib.* See Castle, p. 475.

CHAPTER X.

OF THE REMEDIES FOR THE INFRINGEMENT OF RIGHTS
OF WATER.

ALL infringements of rights of water, natural or acquired, come under one or other of two classes—trespass or nuisance. Where the act complained of is a wrongful disturbance of another in the exclusive possession of property it is a trespass; where the infringement of the right is the consequence of an act which is not in itself an invasion of property, the cause from which the injury flows is termed a nuisance.¹ “The distinction between nuisance and trespass,” says Mr. Angell,² “is that the former is only a consequence or result of what is not directly or immediately injurious, but its effect is injurious. A person who digs a channel or erects a dam on his own land, does no more than what is, in itself, lawful; but as the effect of his so doing is to divert the water from a natural watercourse to the loss of a riparian owner below, or to turn it back to the injury of a riparian owner above, such acts become unlawful,—‘the law in such instances taking care,’ says Blackstone, ‘to enforce the precept of gospel morality of doing to others as we would that they should do unto ourselves.’ Trespass, on the other hand, is a direct and immediate invasion of property,—as treading down grass in a neighbour’s field, or destroying his inclosures.”

All infringements of rights of water either trespass or nuisance.

This distinction between trespass and nuisance, so far as

¹ Phear, *Rights of Water*, p. 100; *Reynolds v. Clarke*, 2 Ld. Raymond, 1399; *Smith v. Milles*, 1 T. R. 475; *Courtney v. Collett*, 12 Mod. 164; 1 Ld. Raymond, 274; *Leveridge v. Hoskins*, 11 Mod. 257; 1 Str. 636.

² On Watercourses, p. 575.

the form of action is concerned, is now of little value, as by *The Common Law Procedure Act*, 1852, and *The Judicature Acts*, 1873 and 1875, all forms of action are abolished.

Public nuisance.

Where the act complained of is an invasion of a public right—such as the obstruction of the public right of navigation or fishery, or the pollution of a river to the public prejudice—it is termed a public or common nuisance.¹

Remedy by Act of Party.

Abatement of private nuisances.

A private nuisance may be removed or abated by the party aggrieved, if it can be peaceably done and without a riot.² Thus if a ditch is dug, by means of which the water is diverted from the land of a riparian proprietor, through whose land it would otherwise flow in its natural course, he may go upon the land of the wrongdoer and fill it up;³ even though at the time it causes him only nominal damage.⁴ A thing, however, cannot be abated, until it actually becomes a nuisance; so that if one see his neighbour erecting that which it is probable will ultimately be such, it cannot be abated as long as it continues in an inoffensive state.⁵

No more damage must be done than absolutely necessary.

If a person injured abate no more than is necessary, any damage resulting from the act will not be laid to his charge; but he must act reasonably and take reasonable care that no more damage be done than is positively necessary for effecting his purpose. Thus where one erected a mill dam partly on his own land and partly on the land adjoining, upon which the owner of the adjoining land pulled down the part on his land, and the whole dam fell down and the water ran out, it was held that the owner was justified.⁶ But where the plaintiff had a right to irrigate his meadow by placing a dam of loose stones across

¹ Woolrych on Waters, p. 192. See Stephen's Blackstone, p. 402.

² Blackstone's Com. 5; *Battens case*, 9 Rep. 54 b.; 2 Roll. Abr.; Nuisance, 8; Angell, p. 576; Woolrych, p. 281.

³ Vin. Abr., Nuisance. See 9

Edw. IV. 35; 8 Edw. IV. 5; *Grey v. Brown*, Mo. 644; *Raikes v. Townshend*, 2 Smith's Rep. 9.

⁴ *Penruddock's case*, 5 Co. 101 b.

⁵ 12 Mod. 510; *Holt's cases*, 499.

⁶ *Wickford v. Bill*, Cro. Eliz. 269.

the stream, and occasionally a board or fender, and he fastened the board with two stakes, which he had no right to do, the defendant was held liable to an action for pulling down the board as well as the stakes, although, as owner of the adjoining land, he had lawful power to abate the latter.¹

So in *Cawkwell v. Russell*,² where the plaintiff had a prescriptive right to send waste water down the defendant's drain, and he sent down also the foul water from his privies, it was held that the defendant was justified in stopping the whole drain; for where a party has a right to send clean water down a drain and chooses to send dirty, every drop of it ought to be stopped, for the whole is dirty.

In the case of *Roberts v. Rose*,³ the plaintiffs, by parol licence from one Lowe and from the defendant, made a watercourse and discharged water thereby, first across the land of Lowe, and then across the land of defendant. The defendant revoked his licence, and on the plaintiffs refusing to discontinue the discharge of water, entered on Lowe's land and obstructed the watercourse there. The defendant, by stopping the watercourse on his own land, would have done less damage to the plaintiff than was actually done, but more damage to Lowe, and possibly some damage to the public. The Court held, that the watercourse had been obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after the revocation of the licence were wrongdoers, was subordinate to the convenience of innocent third parties and of the public. Blackburn, J., delivering the judgment of the Court of Exchequer Chamber, says: "We are all agreed, that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify against the wrongdoer so far

¹ *Greenslade v. Halliday*, 6 Bing. 379. *Cock*, *post*, p. 652.

³ L. R., 1 Ex. 82.

² 26 L. J., Ex. 314. See *Hill v.*

“ as his interference is positively necessary. We are also
 “ agreed, that in abating a nuisance, if there are two ways
 “ of doing it, he must choose the least mischievous of the
 “ two. We also think, that if by one of these alternative
 “ methods, some wrong should be done to an innocent
 “ third party or to the public, then that method cannot be
 “ justified at all, although an interference with the wrong-
 “ doer might be justified.

“ Therefore, where the alternative method involves such
 “ an interference, it must not be adopted; and it may
 “ become necessary to abate a nuisance in a manner more
 “ onerous to the wrongdoer.”

In the case of *Hill v. Cock*,¹ the plaintiff, who had a prescriptive right to the flow of water led by means of a gutter from a mill stream at a point where an ancient weir was erected, wrongfully lengthened the gutter for the purpose of irrigating more land. The flow of water down the defendant's mill stream was thereby diminished, and he in consequence pulled down the ancient weir, and thereby prevented the water from flowing down the plaintiff's gutter. The Court held that the defendant was not justified in stopping the plaintiff's excessive user of the water, by means which altogether prevented his enjoyment of the water, but only in stopping it by the least injurious means in his power. Willes, J., says: “ The
 “ flow of water to defendant's mill was injured by the
 “ alteration of the gutter, and the plaintiff had thereby
 “ destroyed the measure of his right over the old course,
 “ and created a confusion of his antient right. If the
 “ whole of the defendant's enjoyment had been interfered
 “ with, as it was in the case of *Cawkwell v. Russell*,² where
 “ the person who had a right to send clean water through
 “ his gutter sent down foul water, so that the nuisance
 “ could not be stopped without interfering with the enjoy-
 “ ment; if that had been the case, then the taking down
 “ of the weir would have been a reasonable mode of

¹ 26 L. T., N. S. 185.

² 26 L. J., Ex. 34.

"destroying the plaintiff's enjoyment. However, he is bound to abate the nuisance in the most reasonable manner, and subject to there being no confusion of the rights created, the jury have found that it was not practically necessary for the purpose of abating the nuisance to pull down the weir. If the extent of the excess was so great that it was reasonably impossible to abate the nuisance, then I should say there exists a right on the part of the proprietor of the servient tenement to interfere with the whole."¹

No previous demand to remove the nuisance is requisite, except where the tenement on which the nuisance is erected has passed into other hands since the erection; and in this case, without such demand, the abatement would not be lawful, for the new occupant was not liable to a *quod permittat* before request made; but the demand may be made either on the lessor or lessee, for the continuance of a nuisance by the lessee, against whom an action will lie.²

No previous demand to remove, necessary.

A public nuisance may also, it would appear, be abated in a peaceable manner.³ A private individual, however, is not justified in abating a public nuisance, unless it does him a special injury beyond that which is suffered by the rest of the public.⁴ In the case of *The Mayor of Colchester v. Brooke*,⁵ it was held, that if oyster beds are placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it

Abatement of public nuisance.

¹ See also *Arlett v. Ellis*, 7 B. & C. 346; *Yard v. Ford*, 2 Wms. Saund. p. 571, ed. 1871; *Lawton v. Ward*, 1 Ld. Raymond, 75; *Luttrell's case*, 4 Rep. 86 b.

² Gale on Easements, p. 645; *Penruddock's case*, 5 Rep. 101; *Jones v. Williams*, 11 M. & W. 176; *Davies v. Williams*, 16 Q. B. 546; *Burling v. Read*, 11 Q. B. 908; *Perry v. Fitzhove*, 8 Q. B. 778; *Brent v. Haddon*, Cro. Jac. 555;

see also *Saxby v. Manchester*, L. R., 4 C. P. 198.

³ *Lodie v. Arnold*, Salk. 458; *James v. Hayward*, Cro. Car. 184; *Rolle, Abr. Nusans* (T.); *Hill's case*, Cro. Eliz. 384.

⁴ *Benjamin v. Storr*, L. R., 9 C. P. 400; *Hubert v. Groves*, 1 Esp. 148; *Winterbotham v. Derby*, L. R., 2 Ex. 316.

⁵ 7 Q. B. 339.

if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. So in *Dimes v. Petly*,¹ the defendant under similar circumstances was held not justified in running his ship against a wharf of the defendant's projecting into a public navigable river,—the Court holding that a person under such circumstances can only interfere with a public nuisance as far as is necessary to exercise his right of passing along a highway, and cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience. In *Black v. Bateman*,² Lord Campbell, C. J., goes so far as to say that he cannot justify, unless there was no way in which he could exercise his right without the removal.

Remedy by Act of Law.

By action.
Private nuis-
ances.

The remedy by act of law for the infringement of water rights is now by action in one of the first four Divisions of the High Court of Justice.³ By the Supreme Court of Judicature Acts all the jurisdiction of the Court of Chancery and of the common law Courts has been transferred to the High Court of Justice, which is to administer law and equity concurrently, and where there is any conflict between the rules of equity and common law, the rules of equity are to prevail. New rules of pleading and forms are provided which supersede the old forms. Either the Chancery Division or those Divisions which represent and are called after the old common law Courts, have equal power to award damages and the remedy by injunction and mandamus, to enforce equitable rights, and receive and carry out equitable defences. By *The County Courts Act*, 1867,⁴ the County Courts have jurisdiction to try any action in which the title to any corporeal or in-

Injunction
and manda-
mus.

¹ 15 Q. B. 283.

² 18 Q. B. 876.

³ Judicature Acts, 36 & 37 Vict.

c. 66, s. 16, 35; 38 & 39 Vict. c. 77, s. 11.

⁴ 30 & 31 Vict. c. 142, s. 12.

corporeal hereditament comes in question, when neither the value of the land, tenements, or hereditaments in dispute nor the rent payable in respect thereof shall exceed 20*l.* per annum, or, in case of an easement or licence, where neither the value of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed shall exceed 20*l.* per annum.

The tenant in possession may sue for a nuisance, even though it be of a temporary nature only, but if the nuisance be of a permanent nature, and injurious to the inheritance, the reversioner may also have an action, and both the tenant in possession and the reversioner are respectively entitled to recover damages commensurate with the damage sustained by him.¹ To entitle the reversioner to sue, it must be shown either that the act done is an act necessarily injurious to the reversioner, or, where it is not necessarily injurious, the declaration must aver that the reversionary interest is thereby injured.² In an action brought by a reversioner against the defendant for the non-repair of a gutter, whereby the water oozed through and carried away the soil of the close, the defence was, that the injury was the consequence of the tenant in possession penning back the water and watering his meadow. Tindal, C. J., said he thought this no defence, as the owner of the reversion was suing for a permanent injury to his estate, and that he could not be met with the answer that the injury arose out of the wrongful act of the tenant, for which the defendant might have main-

Parties entitled to sue.

¹ Angell on Watercourses, p. 585; Gale on Easements, p. 649; Comyn's Dig., Action for Nuisance (B); *Jackson v. Pesked*, 1 M. & S. 234; *Alston v. Scales*, 9 Bing. 3; *Baxter v. Tayler*, 4 B. & A. 72; *Bell v. Twentyman*, 1 A. & E. 766; see also *Hopwood v. Schofield*, 2 Moo. & Rob. 34; *Tucker v. Newman*, 11 A. & E. 40; *Fay v. Prentice*, 1 C. B. 828; *Kidgell v. Moor*, 9 C. B. 364; *Metropolitan Association v. Petch*, 5 C. B., N. S. 504; *Mumford v. Oxford Railway*, 1 H.

& N. 34; *Sampson v. Savage*, 1 C. B., N. S. 347; *Bell v. Midland Railway*, 10 C. B., N. S. 287; *Crumph v. Lambert*, L. R., 3 Eq. 409; *Johnstone v. Hall*, 2 K. & J. 414; *Mott v. Shoolbred*, L. R., 2 Eq. 22; *Jones v. Chappell*, L. R., 20 Eq. 539; *Wilson v. Townsend*, 1 Dr. & S. 324; *Cleave v. Mahony*, 9 W. R. 882; *Broder v. Saillar*, 2 Ch. D. 292.

² *Metropolitan Association v. Petch*, 5 C. B., N. S. 504; *Bell v. Midland Railway*, 10 C. B., N. S. 287.

tained an action against him. That was merely the personal act of the tenant; and it did not appear that there was any legal duty in the owners and occupiers of the close to do any act, the neglect of which by the tenant had caused the injury.¹

Building a roof with eaves which discharge rain-water by a spout into adjoining premises is an injury which the landlord of such premises may recover as reversioner while they are under demise, if the jury think there is damage to the reversion.²

In *Dyson v. Collick*,³ a contractor for making a canal having, by permission of the owner of the land, laid down a dam for the purpose of the navigation, was held to have sufficient possession to enable him to maintain trespass against a wrongdoer.⁴

Joinder of
plaintiffs

By *Order XVI.* of *The Judicature Act*, 1875, all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court, in disposing of the costs of the action, shall otherwise direct.⁵

By the rules of Chancery, which are followed by the Judicature Acts, the owners of several properties affected by a nuisance might join in suing. If one failed to make out his case, the suit as to him was dismissed with costs. Such costs were deducted from those of the successful plaintiff.⁶

¹ *Egremont v. Putnam*, 1 Moo. & Malk. 404.

² *Tucker v. Newman*, 11 A. & E. 40.

³ 5 B. & Ald. 600.

⁴ See *ante*, p. 234, as to rights of

action for disturbance of easements.

⁵ As to the joinder of parties, see *Wilson's Judicature Acts*, p. 173—185 (2nd ed.).

⁶ *Umfreville v. Johnson*, L. R., 10 Ch. 580; *Pollock v. Lester*, 11 Ha.

The purchaser of an estate injured by a nuisance may sue the original wrongdoer—the person who erected and still maintains the nuisance—without notice or request to abate, for the damage done to the land while he owned and occupied it. Nor does it matter in this respect how many times the land injured may have changed hands since the erection of the nuisance.¹

He who has been the author of a nuisance is answerable for all the consequences thereof; and although after damages recovered in an action for erecting it, another action cannot be maintained for the erection, yet it may for a continuance of the same nuisance. The continuance of that which was originally a nuisance is, in fact, a new nuisance.² For the continuance of a nuisance, each successive owner of the land on which there exists an actual nuisance, is liable; though it may have been begun before his estate commenced.³

Parties liable to be sued

Where, however, the party was not the originator of the nuisance, a request must be made to remove it before any action is brought; but it is sufficient if such request is made to the party in possession, though he be only lessee;⁴ and a request to a former occupier while in possession has been held sufficient to bind a subsequent occupier.⁵

If the owner of land on which a nuisance exists lets the land, an action for the continuance of the nuisance will lie at the option of the party injured, either against the

for continuance of nuisance

274; see, however, *Hudson v. Madison*, 12 Sim. 416. In the case of *Cowan v. Duke of Buccleuch*, 2 App. Cas. 344, the House of Lords held, that by the practice of the Scotch Courts, in a case of nuisance by pollution, the several sufferers may combine and bring a joint action against the several authors of the nuisance—asking a declarator and interdict, but not claiming damages.

¹ *Angell on Watercourses*, p. 587; *Penruddock's case*, 5 Rep. 100; *Eastman v. Amoskeag Manufacturing*

Co., 4 N. H. 143 (*American case*); *Shadrivell v. Hutchinson*, 2 B. & A. 97; 4 C. & P. 333; *Batiskill v. Reed*, 18 C. B. 696; *Wilson v. Peto*, 6 Moo. 47; *Gale on Easements*, p. 649—658.

² *Angell on Watercourses*, p. 587.

³ *Gale on Easements*, p. 659.

⁴ *Penruddock's case*, 5 Rep. 181; *Brent v. Hudson*, Cro. Jac. 555; *Jones v. Williams*, 11 M. & W. 176.

⁵ *Salmon v. Bensley*, Ry. & M. 189, at Nisi Prius.

landlord or the tenant;¹ but no such action lies against the landlord for any such act of his tenant during the continuance of his tenancy;² and a declaration charging the defendant with the duty of cleansing drains, merely as owner and proprietor thereof, is bad.³ If, however, a landlord makes a drain for the use of his tenants, and keeps it in his own possession, and allows them to use it, he is liable if it becomes a nuisance through their user whilst in his possession.⁴

A landlord has been held not liable if he has taken a covenant to repair from the tenant, as in such case he does not authorize the continuance of the nuisance.⁵

by a stranger.

So the owner of land has been held not responsible for the act of a stranger causing or continuing a nuisance, which he neither authorized nor adopts. Thus, in *Saaby v. Manchester Railway*,⁶ the defendants were owners of the soil of a stream which supplied water to two print works. A., whilst occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from defendants, and against their will, replaced the weir. The Court held that the defendants were not responsible for the act of A., or for the continuance of the nuisance; and that a nonsuit which had been directed was right.⁷

¹ *Todd v. Flight*, 9 C. B., N. S. 377; *Mason v. Shewsbury*, L. R., 6 Q. B. 585; *Christian Smith's case*, Sir W. Jones, 272; *Roswell v. Prior*, 2 Salk. 460; *R. v. Pedley*, 1 A. & E. 822; *Thompson v. Gilbert*, 7 M. & W. 456; see, however, *Rypon v. Bowles*, Cro. Jac. 373.

² *Cheetham v. Hampson*, 4 T. R. 318; *Rich v. Basterfield*, 4 C. B. 783; *Bishop v. Bedford*, 1 E. & E. 697; *Preston v. Norfolk*, 2 H. & N. 735; *Bartlett v. Baker*, 3 H. & C. 153.

³ *Russell v. Shenton*, 3 Q. B. 449.

⁴ *Brown v. Russell*, L. R., 3 Q.

B. 261.

⁵ *Pretty v. Bickmore*, L. R., 8 C. P. 401; *Gwinnell v. Eamer*, L. R., 10 C. P. 658; see *Gandy v. Jubber*, 5 B. & S. 78, 485; 9 B. & S. 15; *Robbins v. Jones*, 15 C. B., N. S. 240.

⁶ L. R., 4 C. P. 198.

⁷ See also *Daniells v. Potter*, 4 C. & P. 262. For other cases on responsibility for nuisance, see *Pendleby v. Greenhalgh*, 1 Q. B. D. 36; *Pickard v. Smith*, 10 C. B., N. S. 470; *Hyams v. Webster*, L. R., 2 Q. B. 138; *Hadley v. Taylor*, L. R., 1 C. P. 53.

Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action; but it is sufficient to show the violation of the right, and the law will presume damage.¹

Whether proof of actual damage is necessary to support an action.

Thus, in *Rose v. Groves*,² where the plaintiff was the owner of a public house on a navigable river, and defendant obstructed his right of access thereto, by placing floats of timber in front thereof, the Court held that, this being the obstruction of a private right, proof of special damage was unnecessary.

Any unreasonable and unauthorized use of the common benefit of the flow of water, as between riparian proprietors, will give a right of action to the party whose rights are infringed, without proof of actual damage. Thus, the claim by an upper riparian proprietor, to divert permanently the whole of a stream, for the purpose of supplying a town with water, is not a reasonable use connected with the tenement of that proprietor, and he will be restrained from so using the water, though no injury has been sustained by the lower riparian proprietor.³

In *Pennington v. Brinsop Hall Co.*,⁴ plaintiff claimed as a riparian proprietor of a mill, and also as having forty years' prescriptive right to the use of pure water. Defendants alleged, admitting the pollution, that the water did no appreciable injury to plaintiffs, and that the water was first polluted by others. They urged that if an injunction was granted they would be ruined. Fry, J., said, "Plaintiffs allege that the defendants pollute the stream so as to create an injury to plaintiffs' rights, and they say,

¹ Per Parke, B., in *Embrey v. Owen*, 6 Ex. 353; *Wood v. Waud*, 3 Ex. 748.

² 5 M. & G. 613; see also *Lyon v. Fishmongers' Co.*, 1 App. C. 662.

³ *Swindon Waterworks v. Wilts Canal*, L. R., 7 H. L. 697; *Claxton v. Claxton*, Ir. R., 7 C. L. 23; *Harrop v. Hirst*, L. R., 4 Ex. 43; *Sampson v. Hoddinot*, 1 C. B., N. S. 590; *Ellwell v. Crowther*, 10 W. R. 615; *Medway v. Romney*, 9 C.

B., N. S. 575; *Northam v. Hurley*, 1 E. & B. 665; *Mason v. Hill*, 5 B. & A. 1; *Earl Ripon v. Hobart*, 3 Myl. & K. 169; *Williams v. Moreland*, 2 B. & C. 910.

⁴ 5 Ch. Div. 769; see also *Clowes v. Staffordshire Potteries*, L. R., 8 Ch. 125; *Crossley v. Lightowler*, L. R., 2 Ch. 478; *St. Helens v. Tippling*, 11 H. L. 642; *A.-G. v. Leeds*, L. R., 5 Ch. 583.

“ 1st, that this is an injury accompanied by damage ; and,
 “ 2nd, that if it be unaccompanied by damage they have
 “ nevertheless a good cause of action. This second proposi-
 “ tion of plaintiffs is, in my judgment, well founded. . . .
 “ I may observe, in passing, that the case of a stream
 “ affords a very clear illustration of the difference between
 “ injury and damage, for the pollution of a clear stream is
 “ to a riparian proprietor below both injury and damage,
 “ whilst the pollution of a stream already made foul and
 “ useless by other pollutions is an injury without damage,
 “ which would, however, at once become both injury and
 “ damage on the cessation of the other pollutions.”

A riparian proprietor exercising in a reasonable way his ordinary riparian rights, will not, however, be liable to an action unless he work actual damage to another riparian owner above or below him.¹

“ By the general law,” says Lord Kingsdown, “ applicable
 “ to running streams, every riparian proprietor has a right
 “ to what may be called the ordinary use of the water
 “ flowing past his land, for instance, to the reasonable use
 “ of the water for his domestic purposes and for his cattle,
 “ and this without regard to the effect which such use may
 “ have in case of deficiency upon proprietors lower down
 “ the stream. But, further, he has a right to the use of it
 “ for any purpose, or what may be deemed the extraordi-
 “ nary use of it, provided he does not interfere thereby
 “ with the rights of other proprietors either above or below.
 “ Subject to this condition he may dam it up for the pur-
 “ pose of a mill or divert the water for the purpose of
 “ irrigation. But he has no right to interrupt the regular
 “ flow of the stream if he thereby interferes with the law-
 “ ful use of the water by other proprietors and inflicts
 “ upon them a sensible injury.”²

¹ *Embrey v. Owen*, 6 Ex. 353;
Orr Ewing v. Colquhoun, 2 App. C.
 839; *Bickett v. Morris*, L. R., 1 H.
 L., Sc. 47; *Swindon Water Co. v.*
Wilts and Berks Canal, L. R., 7 H.

L. 697; *Holker v. Porrit*, L. R., 10
 Ex. 59; see also *Weeks v. Howard*,
 10 W. R. 557.

² *Miner v. Gilmour*, 12 Moo. P. C.
 131. See ante, Ch. III. p. 115 et seq.

To entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must show that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial.¹ Thus, in *Rose v. Miles*,² where the plaintiff was obstructed in his use of a navigable water, and was damaged by being obliged to unload his barge and carry his goods overland, the Court held that he had a good cause of action.

Public nuisance, when actionable

A party guilty of causing a public nuisance may be prosecuted by indictment, upon which he may be fined and imprisoned, and judgment given to abate the nuisance.³ The question in all such cases being whether the acts done amount to a nuisance.⁴

and indictable.

Another remedy for a public nuisance is by information at the suit of the attorney-general. Where a person has sustained special damage over and above the general damages sustained by the public, there may be both an information and an action. The attorney-general may file an information to restrain the thing complained of as a public nuisance; and the individual who sustains a particular damage may join as plaintiff as well as relator and have the remedy for himself by action.⁵

Information and suit.

A local board might sue in respect of a public nuisance without making the attorney-general a party;⁶ but under *The Public Health Act*, 1875, the sanction of the attorney-general is required if proceedings are taken for the purpose of protecting a watercourse from pollution.⁷

¹ *Benjamin v. Storr*, L. R., 9 C. P. 400; *Hubert v. Groves*, 1 Esp. 148; *Ricket v. Metropolitan Railway*, L. R., 2 H. L. 175; 5 B. & S., per Erle, C. J., p. 761; *Winterbotham v. Lord Derby*, L. R., 2 Ex. 316; *Pain v. Patrick*, 3 Mod. 289.

² 4 M. & S. 101; see *Hart v. Barnett*, T. Jones, 156; *Greasley v. Codling*, 9 Moo. 489; *Wiggins v. Boddington*, 3 C. & P. 544.

³ 4 Blackstone's Com. 167; *Reg. v. Wigg*, Salk. 460; *Reg. v. Russell*, 6 B. & C. 566; *Reg. v. Ward*, 4 A. & E. 384; *Reg. v. Lindall*, 6 A. &

E. 143; *Reg. v. Morris*, 1 B. & A. 441.

⁴ *Reg. v. Medley*, 6 C. & P. 292.

⁵ Kerr on Injunctions, p. 167; *A.-G. v. Johnson*, 2 Wils. C. C. 87; *A.-G. v. Sheffield*, 3 D. M. & G. 304; *A.-G. v. Lonsdale*, L. R., 7 Eq. 377; *A.-G. v. Halifax*, 17 W. R. 1088; *A.-G. v. Hackney*, L. R., 20 Eq. 626; *A.-G. v. Birmingham*, 4 K. & J. 328; *A.-G. v. Cocker-mouth*, L. R., 18 Eq. 172.

⁶ *Nuneaton Local Board v. General Sewage Co.*, L. R., 20 Eq. 127.

⁷ 38 & 39 Vict. c. 55, s. 69.

An information will lie against a corporation which has become a sanitary authority under the Public Health Act, for allowing sewage to continue to run from a drain in the town into a canal; and they are liable to be restrained by injunction from continuing such nuisance, though they derive no profit from the works causing the nuisance.¹

Indictment
for non-
repair of
bridges.

On an indictment for the non-repair of a bridge, the inhabitants of a county are bound to repair every *public* bridge within it unless they can show by their plea that some other person or body politic or corporate is liable, and every bridge in a highway is by the Statute of Bridges, 22 *Hen. III. c. 5*, taken to be a public bridge for this purpose.²

No action
lies against a
county,

The proper remedy therefore against a county is by indictment, and no action will lie against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair.³

or against a
county sur-
veyor.

On a similar principle it has been held that no action for personal and peculiar damage resulting from the want of proper repair in a county bridge will lie against the county surveyor, either at common law, or under 43 *Geo. III. c. 59*.⁴

¹ *A.-G. v. Basingstoke*, 45 L. J., Ch. 726.

² *Rex v. Bucks*, 12 East, 192; cf. *Rex v. West Riding of Yorkshire*, 2 East, 342; *Rex v. Hendon*, 4 B. & Ad. 628; *Rex v. Lancashire*, 2 B. & Ad. 813; *Rex v. Northampton*, 2 M. & S. 262; *Rex v. Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 C. & P. 208. As to Bridges generally, see ante, Ch. VIII.

³ *Russell v. Devon*, 2 T. R. 667.

⁴ *Mackinnon v. Penson*, 8 Exch. 319. Per Pollock, C. B.: "This was an action against defendant as surveyor of a county bridge for a particular damage sustained by the plaintiff in consequence of a want of repair of a county bridge. . . . The only question is, whether an action for

"a peculiar damage resulting to the plaintiff for want of proper repair to a county bridge will lie against the county's surveyor.

"There is no doubt of the truth of the general rule that when an indictment can be maintained against an individual or a corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the ordinary case of a nuisance on the highway by a stranger digging a ditch across it, or by the default of the person bound to repair *ratione tenuræ*. . . . (Hall v. Mayor of Lyme Regis, 5 Bing. 91; and 8 Bligh. 690, as to repair of sea walls.) . . .

An indictment will not lie for repairing a bridge unless it be in a highway. "Highways" is a general term for all public ways, as well cart, horse, and footways, and an indictment lies for any one of these ways if they are common to all the Queen's subjects.¹ If a way be in decay an indictment of necessity lies, for an action on the case will not lie without special damage,² and no action on the case will lie against inhabitants of a county for non-repair of a bridge, because they are not a corporation, and cannot be sued.³

Upon an indictment charging a township with a prescriptive liability to repair a bridge, the declarations of an ancient inhabitant are admissible against the township, for he is a party to the record, whether rated or not.⁴

Declaration of ancient inhabitants admissible in evidence.

Where an indictment had been preferred against a county for not repairing a bridge, at the instance of the inhabitants of a parish, and the question intended to be tried was, whether the inhabitants of the parish or those of the county were liable for its repair, the Court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the repair of the bridge,⁵ and also held that the bridge wardens ought not to be compelled, they being trustees for the parish.⁶

Right to inspect parish books.

The inhabitants of a county pleaded to a presentment Reputation.

"But it has been held, no such action on the case would lie against the inhabitants of a county for a special injury sustained by a plaintiff by reason of their neglect to repair a county bridge. (*Russell v. Men of Devon*, 2 T. R. 667.) We think it clear, on the full consideration of that case, that the only reason why the action would not lie was because the inhabitants of the county were not a corporation and could not be sued,—a difficulty which was got rid of in the case of the Statutes of Hue and Cry by giving a specific remedy

"against the hundred. We have then to decide whether the 4th sect. of 42 Geo. 3, c. 59 removes that difficulty. . . . We have, therefore, come to the conclusion that judgment ought to be arrested."

¹ *Reg. v. Saintiff*, 6 Mod. 255; Holt, 129.

² *Ib.*; 2 Lord Raymond, 1174.

³ Pollock, C. B., in *Mackinnon v. Penson*, 8 Exch. 319.

⁴ *Rex v. Adderbury East*, 1 D. & M. 324.

⁵ *Rex v. Buckingham*, 8 B. & C. 375; 2 M. & M. 412.

⁶ *Ib.*; per Lord Tenterden.

against the inhabitants of a county for not repairing a bridge, that A. was liable to repair it *ratione tenuræ*. Issue on A.'s liability :—Held, that evidence of reputation *was admissible* to prove such liability on A.'s part.¹

By sect. 64 of 13 *Geo. III. c. 78*, the Court before whom any indictment is tried for not repairing highways is empowered to award costs to the prosecutor if it shall appear to the Court that the defence to such an indictment was frivolous.

Sect. 1 of 43 *Geo. III. c. 59* enacts that “the penalties, forfeitures, matters and things in the former Act contained relating to highways are extended as far as the same were therein repeated and re-enacted.”

The 13 *Geo. III. c. 78* is repealed by 5 & 6 *Will. IV. c. 50*, sect. 98 of which empowers the Court before whom any indictment shall be preferred for not repairing highways to award costs to the prosecution where the defence appears to be frivolous.

Sect. 5 provides that the word “highways” shall include all bridges “*not being county bridges.*”

To an indictment for the non-repair of a county bridge, the defendants pleaded that a particular hundred were liable to repair it. The jury found the defendants guilty, and the judge who tried the case, thinking the defence frivolous, gave a certificate for costs :—Held that, although the 5 & 6 *Will. IV. c. 50* did not apply to county bridges, and repealed the 13 *Geo. III. c. 78*, yet that the 43 *Geo. III. c. 59* incorporated the latter Act, and kept alive the power in the judge of granting the certificate for costs.²

The Court of Quarter Sessions cannot impose more than one fine for the non-repair of a bridge.³

The Court is reluctant to stay judgment on an indictment for not repairing a bridge. They will not stay it generally, but only till further order; and if trial of

¹ *Reg. v. Bedfordshire*, 4 El. & Sess. Cas. 316; 6 Q. B. 343; 8 Bl. 535; 1 Jur., N. S. 208; 24 L. Jur. 778; 13 L. J., M. C. 158.

J., Q. B. 81.

² *Reg. v. Merionethshire*, 1 New 4 B. & A. 469.

³ *R. v. Machynleth and Penegocs*,

another indictment is proceeded in with all despatch, judgment will be given.¹

The sessions are not authorized to order the payment by their bridgemaster to the clerk of the peace of a percentage on all money raised for repair of bridges in a particular district in lieu of all his fees for indictments, presentments, &c. for bridges within it; although such percentage was claimed as an ancient fee, and had been paid without dispute for a long period of time.²

Per Lord Ellenborough,³ "I accede fully to the doctrine laid down by Lord Kenyon in the case cited,⁴ that wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates who have the superintendence over the county purse, have necessarily a right to defray such expenses out of the county stock. . . . But the question is, whether they had a right to make that order in these terms. . . . Then this Court seeing that the magistrates have adopted an improper and illegal rule for computing the amount of this compensation, can do no otherwise than quash this order which is founded on that computation."⁵

A right of distress is incident to every toll,⁶ and the Tolls. distress may be made on the thing itself in respect of which the toll is due, or on any portion of it, as on a ship or any part of it, for a toll due on goods exported on the ship.⁷

In cases of nuisance and injury to the rights of pro- Injunctions.

¹ *R. v. Southampton*, 2 Chitty, 215.

² *Rex v. Houldgrave*, 1 B. & A. 312; cf. *Rex v. Bird*, 2 B. & A. 522; *Rex v. Dorset*, 15 East, 5.

³ *Rex v. Houldgrave*, 1 B. & A. 312.

⁴ *The King v. Inhabitants of Esscx*, 4 T. R. 59.

⁵ In *Rex v. Bird*, 2 B. & Ad. 22.

⁶ Gunning on Tolls, p. 216; Bac. Abr. tit. Distress (F), pl. 6; Vin. Abr. tit. Toll, 1; *Heddy v. Wheelhouse*, Cro. Eliz. 558.

⁷ Gunning on Tolls, p. 216; *Finkensterne v. Ebdon*, 1 Ray. 386; 1 Salk. 248; Carth. 357.

Interlocutory. property, the Courts will interfere by injunction in aid of the legal right for the purpose of protecting the property from damage. Thus an interlocutory injunction will be granted to protect the property from irreparable, or at least from substantial or material damage pending the trial of the right.¹ After the establishment of the right, and of the fact of its violation, a man is in general entitled, as of course, to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case.²

Perpetual. If the case made out is such that the recovery of damages will give a full and adequate compensation for the injury, no foundation is laid for the interference of the Court by way of injunction. If, on the other hand, the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the Court by way of injunction.³ The order may be framed so as to compel a defendant to restore things to their former condition; and when framed in such a form it is called a mandatory injunction.⁴

Foundation for interference of the courts by injunction. The jurisdiction of the Court is founded on the equity of relieving a man from the necessity of bringing repeated actions for damages for every violation of a common law right, and of finally quieting the right, after a case has received such full decision as entitles a man to be protected against further trials of the right.⁵

Mandatory injunctions. Where, therefore, an action for damages by a riparian proprietor lies for an interference with a stream, the Court will interfere by injunction to restrain the nuisance,

Injunctions granted to prevent repeated actions,

¹ See Kerr on Injunctions, p. 165.

² *Ib.* p. 44; *Wood v. Sutcliffe*, 2 Sim., N. S. 166; *Imperial Gas Company v. Broadbent*, 7 H. L. 612.

³ Kerr on Injunctions, p. 165; *A.-G. v. Nicholl*, 16 Ves. 338; *A.-G. v. Sheffield*, 3 D., M. & G.

319; *Wilson v. Townend*, 1 Da. & Sm. 329.

⁴ Kerr on Injunctions, p. 50; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *A.-G. v. Birmingham*, 4 K. & J. 547.

⁵ *Loundes v. Bettie*, 33 L. J., Ch. 451.

even where no actual damage is proved, to prevent the inconvenience of repeated actions;¹ and also where the act done is claimed as of right, on the ground that the repetition of the act would at the end of twenty years establish a right in the claimant in derogation of the prior right.² and to prevent acquisition of rights.

If the effect of granting an injunction would have the effect of inflicting serious damage upon the defendant, without restoring or tending to restore the plaintiff to the position in which he originally stood, or doing him any real practical good, or if the mischief complained of can be fully and adequately compensated by a pecuniary sum, an injunction will not issue.³ If, on the other hand, the mischief complained of is of so material a nature that it cannot be properly, fully and adequately compensated by a pecuniary sum, and the granting an injunction will restore or tend to restore the parties to the position in which they formerly stood, it is the duty of the Court to interfere by perpetual injunction, notwithstanding the serious damage caused thereby to the defendant.⁴

The Court will not hold its hand upon the ground of a decision being appealed from, unless it has some doubt of the justice of that decision.⁵

The Court will not interfere by injunction in a case of merely prospective injury; but although the fact of prospective nuisance is not of itself a ground for the interference of the Court,⁶ yet if some degree of present nuisance exists, the Court will take into account its probable continuance and increase.⁷ Prospective injury.

¹ *Pennington v. Brinsop*, 5 Ch. Div. 769; *Clowes v. Staffordshire Water Company*, L. R., 8 Ch. 125, 143.

² *Swindon Water Company v. Wilts and Berks Canal*, L. R., 7 H. L. 697; *Goldsmith v. Tunbridge Wells*, L. R., 1 Ch. 349; *Crossley v. Lightowler*, L. R., 2 Ch. 478; *Harrop v. Hirst*, L. R., 4 Ex. 43.

³ *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Bankart v. Houghton*, 27 Beav. 431.

⁴ *Pennington v. Brinsop*, 5 Ch. D. 769; *A.-G. v. Birmingham*, 4 K. & J. 328; *Spokes v. Banbury*, L. R., 1 Eq. 42; *Wood v. Sutcliffe*, 2 Sim., N. S. 166; *Bankart v. Houghton*, 27 Beav. 431; *A.-G. v. Bradford*, L. R., 2 Eq. 71.

⁵ *A.-G. v. Bradford*, L. R., 2 Eq. 71.

⁶ *A.-G. v. Kingston*, 13 W. R. 888.

⁷ *Goldsmith v. Tunbridge*, L. R., 1 Eq. 349; *A.-G. v. Sheffield*, 3

No part of the duty of the Courts to inquire in what way nuisances may be removed.

Where the plaintiff has proved a right to an injunction, it is no part of the duty of the Court to inquire in what way the defendant can best remove the nuisance. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his way out of the difficulty, whatever the inconvenience and expense he may be put to. Where the difficulty of removing the injury is great, the Court will suspend the injunction for a time to render its removal possible.¹ Where an injunction was granted to restrain defendants from pouring sewage into a river, and execution of the order was stayed till July 1st, and the defendants did not subsequently to July 1st stop the nuisance, alleging that they had not yet found a way of deodorizing it, and that compliance with the order was physically impossible; it was held that this was a gross and wilful contempt of Court, and sequestration was ordered to issue.²

Injunction to restrain diversion and obstruction of water.

The Courts will grant injunctions to restrain the diversion and obstruction of water in a natural stream; and though merely nominal damages may have been recovered for the diversion, the Court will interfere and vindicate the right by perpetual injunction, if the act complained of will cause irreparable mischief or permanent injury, or would have the effect of destroying a right.³ If necessary the injunction will be in a mandatory form.⁴

Pollution.

So the Courts will restrain the fouling and pollution of

D., M. & G. 304; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 89 L. J., Ch. 129; *Elliott v. North Eastern Railway*, 10 H. L. 333; *A.-G. v. Hackney*, L. R., 20 Eq. 631; *Earl Ripon v. Hobart*, 2 M. & K. 169; *Cator v. Lewisham*, 11 Jur. 340; *Ellwell v. Crowther*, 31 Beav. 163.

¹ *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Halifax*, 39 L. J., Ch. 129; *Pennington v. Brinsop*, 5 Ch. D. 769; *A.-G. v. Birmingham*, 4 K. & J. 328.

² *Spokes v. Banbury Board of Health*, L. R., 1 Eq. 42.

³ *Swindon Water Co. v. Wilts and Berks Canal*, L. R., 7 H. L. 697; *Grand Junction Canal v. Shugar*, L. R., 6 Ch. 483; *A.-G. v. Great Eastern Railway*, L. R., 6 Ch. 577; *Ellwell v. Crowther*, 31 Beav. 163; *Rochdale Canal v. King*, 2 Sim., N. S. 79; *Tipping v. Eckerstey*, 2 K. & J. 264; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Weller v. Smeaton*, 1 Bro. C. C. 572.

⁴ *Harrop v. Hirst*, L. R., 4 Ex. 43.

water to the injury of a riparian owner, even where the damage is only nominal, upon the ground of the inconvenience of leaving the parties to repeated and successive actions for damages;¹ but it is right, in an order for an injunction, to insert the words "to the injury of the "plaintiff," to prevent the authority of the Court being invoked for trivial reasons.²

The Courts will not grant an injunction unless some perceptible pollution exists; and in the case of *A.-G. v. Cockermouth*,³ Jessel, M. R., refused to grant an injunction at the suit of a local board to restrain the defendants from discharging sewage into a stream eight miles above the intake of the plaintiffs' waterworks, the evidence showing that chemical analysis failed to detect any pollution in the water at the intake of the waterworks, though it was polluted at the point of discharge. In the same case, however, the Master of the Rolls granted an injunction at the suit of the Attorney-General, on the ground that *The Local Government Acts*, 1858 and 1861, rendered it illegal for the defendants to discharge the sewage by an outfall out of their district, so as to affect or deteriorate the water at the point of discharge.

In *Weeks v. Howard*,⁴ Wood, V.-C., refused to grant an injunction to restrain the defendant from draining the water out of a gravel pit, which water the plaintiff alleged being muddy,⁵ hindered the growth of his watercresses, on the ground that the defendant had as much right to use the stream for such discharge as the plaintiff had to grow his watercresses there.

Where actual substantial damage is shown, the Courts will interfere by injunction to prevent its continuance.⁶

¹ *Pennington v. Brinsop*, 5 Ch. D. 769; *Clowes v. Staffordshire*, L. R., 8 Ch. 125.

² *Lingwood v. Stowmarket*, L. R., 1 Eq. 77. For form of order, see *Ib.* 336.

³ L. R., 18 Eq. 172.

⁴ 10 W. R. 567.

⁵ Making water muddy is not pollution. See *Tayler v. Bennet*, 7 C. & P. 329; 39 & 40 Vict. c. 75, s. 20.

⁶ *A.-G. v. Leeds*, L. R., 5 Ch. 589; *Crossley v. Lightowler*, L. R., 2 Ch. 418; *Goldsmith v. Tunbridge*, L. R., 1 Ch. 349; *A.-G. v. Bir-*

In granting injunctions to restrain pollution by sewage matter, the practice is to grant an immediate injunction restraining any new communications with the river; but, as to existing drains, to suspend the operation of the order for a time to enable the defendants to comply with the order, by altering their works.¹

In the case of injury to riparian rights, the Courts will not, except in special cases, award damages in lieu of an injunction.² The injunction may be in a mandatory form.³

Purpresture and public nuisance to navigable rivers.

Any invasion of the right of the Crown to the bed of the sea or navigable river is a purpresture, and may be restrained by injunction at the suit of the Attorney-General, whether it be a nuisance or not. If the act complained of be merely a trespass on the property of the Crown, and not a nuisance to the navigation, the Court will generally direct an inquiry, whether it is more beneficial to the Crown to abate the purpresture, or to suffer it to remain. But if it be also a public nuisance this cannot be done, for the Crown cannot sanction a public nuisance.⁴ Erections on the bed of navigable rivers are not necessarily nuisances, but if they obstruct the navigation they may be abated by information and injunction, or by indictment. The true question in each case is, whether or not a damage accrues to the navigation in the particular locality.⁵

Right of access.

Any interference, however, with the right of access

mingham, 4 K. & J. 528; *Bidder v. Croydon*, 6 L. T., N. S. 778; *A.-G. v. Luton*, 2 Jur., N. S. 180; *Manchester v. Worksop*, 23 Beav. 198; *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Tipping v. Eekersley*, 2 K. & J. 264; *Oldaker v. Hunt*, 6 D., M. & G. 376.

¹ *Goldsmith v. Tunbridge*, L. R., 1 Ch. 163; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 17 W. R. 1088; *A.-G. v. Birmingham*, 19 W. R. 561; *Pennington v. Brinsop*, 5 Ch. D. 769.

² *Pennington v. Brinsop*, 5 Ch. D. 769; *Kerr on Injunctions*, pp. 243,

244.

³ *Spokes v. Banbury*, L. R., 1 Eq. 42.

⁴ *A.-G. v. Terry*, L. R., 9 Ch. 423; *A.-G. v. Lonsdale*, L. R., 7 Eq. 388; *A.-G. v. Johnson*, 2 Wils. Ch. 87; *Parmeter v. A.-G.*, 10 Price, 412; *A.-G. v. Parmeter*, 10 Price, 378; *A.-G. v. Burridge*, 10 Price, 350; *Bristol Harbour case*, cited 18 Ves. 214; *A.-G. v. Richards*, 2 Anstr. 603; see also *Gann v. Free Fishers*, 11 H. L. 292.

⁵ *A.-G. v. Terry*, L. R., 9 Ch. 423; *A.-G. v. Lonsdale*, L. R., 7 Eq. 388; *Reg. v. Betts*, 16 Q. B. 1023; *R. v. Ward*, 4 Ad. & E. 386.

which a riparian owner has to a navigable river for the purposes of exercising the public right of navigation, is an injury to a right of property, and actionable without proof of special damage, and may be restrained by injunction.¹ It is a question of fact in each case, whether an obstruction in a river amounts to an interference with the right of access to a river frontage.²

An action will lie for the breaking and entering a Fishery. several or a free fishery.³ The owner of a several fishery may maintain trespass for taking his fish, but the owner of a free fishery has not such a property as to enable him to maintain trespass for taking fish, such fish not being his property until caught.⁴

The obstruction of the passage of fish, as by weirs, is actionable by the owner of a fishery prejudiced thereby.⁵

The pollution of a river, which has the effect of killing or driving away fish, may be restrained by injunction.⁶

In a case where a man, by making an embankment and enclosing the bed of a river, shut out and prevented the tide from reaching a mussel bed and breeding ground, the Court granted an injunction to restrain this encroachment on the principle of irreparable damage to the fishery, without entering on or deciding the question as to the right of ownership in the soil.⁷

¹ *Lyon v. Fishmongers' Co.*, 1 App. C. 662; *Rose v. Groves*, 5 M. & G. 613; *Dobson v. Blackmore*, 9 Q. B. 991; *Hubert v. Groves*, 1 Esp. N. P. C. 148; *Fineux v. Hoveden*, Cro. Eliz. 664.

² *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.).

³ *Holford v. Bailey*, 13 Q. B. 426.

⁴ *Blomfield v. Johnson, Jr.*, 8 C. L. 68; *Child v. Greenhill*, Cro. Car. 553; *Gipps v. Woollicott*, Skin. 577; *Upton v. Dawkins*, 3 Mod. 97.

⁵ *Weld v. Hornby*, 7 East, 195; *Marquis of Donegal v. Hamilton*, 3 Ridg. P. C. 267; *Leconfield v. Lonsdale*, L. R., 5 C. P. 726, per Bovill, C. J.

⁶ *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Bidder v. Croydon*, 6 L. T., N. S. 778; *Oldaker v. Hunt*, 6 D., M. & G. 376; *Aldred's case*, 9 Rep. 59 a.

⁷ *Bridges v. Highton*, 11 L. T., N. S. 653.

APPENDIX.

RULES AND BYE-LAWS FOR THE REGULATION OF THE NAVIGATION OF THE RIVER THAMES.

I. Bye-laws framed under an Order in Council of 5th February, 1872.

1. All bye-laws, rules, and orders for the regulation, management and improvement of the river Thames and the navigation thereof, and for compelling vessels at anchor or otherwise to carry or exhibit lights from sunset to sunrise, and for the government, good order and regulation of vessels in or upon the said river, and of persons navigating the same, or using the towing-paths, piers, landing-places, or any of the locks thereof, also for the mooring of timber, and for the government and regulation of the officers, servants and workmen in their employment, except the bye-laws for regulating the fisheries of the 4th October, 1785, the 23rd of January, 1860, and the Upper Thames bye-laws, 1869, shall, after these present bye-laws shall have been allowed by order of her Majesty in Council, be and the same are hereby repealed.

Former bye-laws repealed.

2. That in the following bye-laws the words and expressions hereinafter mentioned shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction.

Interpretation clause.

The word "person" shall include corporations, whether aggregate or sole.

The word "horse" shall include all draught animals.

The word "vessel" shall mean any ship, lighter, barge, boat, wherry, punt, raft, or craft, and any kind of vessel whatever, whether navigated by steam or otherwise.

The word "collier" shall mean any vessel, the cargo of which shall consist of coal.

The word "station" shall mean any section, berth, or station for mooring or anchoring of vessels.

The word "master," when used in relation to any vessel, shall mean any person, whether the owner or not, lawfully or wrongfully, having or taking the command, charge or management of the vessel for the time being.

The word "harbour-master" shall be taken to mean and shall apply to each of the harbour-masters and the deputy harbour-master, and to any person authorized by the Conservators to assist them or to perform the duties of the said harbour-masters during the absence of any of them from any cause whatsoever.

C.

X X

The word "river Thames" or "river" shall mean so much of the river Thames, and such part of its tributaries within the jurisdiction of the Conservators, as is between Cricklade, in the county of Wilts, and Yantlet Creek, in the county of Kent.

The words "in writing" applied to any document shall include documents wholly printed or wholly written, or partly printed and partly written.

Accommodation for vessels between London Bridge and Irongate Stairs.

Width of passage between Irongate Stairs and Barking Creek.

Number of vessels to be moored at the respective tiers.

3. The harbour-master shall provide as far as practicable accommodation between London Bridge and Irongate Stairs for vessels passing up and down the river, maintaining as far as practicable a navigable passage of not less than two hundred feet.

4. The harbour-master shall provide and maintain as far as practicable for vessels passing up and down the said river between Irongate Stairs and Barking Creek a navigable passage of not less than three hundred feet, and where the navigable passage shall be between a tier of vessels and the shore the space hereby allotted for any such passage shall be reckoned from the vessel in such tier which shall be nearest to the said shore to the low-water mark on the said shore, and in all parts of the river where the navigable passage shall be in the stream between tiers of vessels the space allotted for the navigable passage shall be reckoned from the vessel in each of the said tiers nearest to the other or opposite tier.

5. The several tiers used by colliers shall be placed as near to the respective shores of the river as the depth of the water will permit, and no more colliers or vessels shall be moored and distributed thereat at the same time than the number hereinafter respectively specified and allotted, that is to say—

ON THE SOUTH SIDE OF THE RIVER.

Princes Stairs,	upper tier,	Ten vessels.
Princes Stairs,	lower tier,	Ten vessels.
Church Hole,	upper tier,	Ten vessels.
Church Hole,	lower tier,	Twelve vessels.
Hanover Hole,	upper tier,	Twelve vessels.
Hanover Hole,	lower tier,	Twelve vessels.
Mill Hole tier,	Twelve vessels.

ON THE NORTH SIDE OF THE RIVER.

Bell Wharf tier	Fourteen vessels.
Stone Stairs tier	Eighteen vessels.
Ratcliffe Cross, upper tier,	Sixteen vessels.
Ratcliffe Cross, lower tier.	Six vessels.

At all the said tiers or stations hereinbefore mentioned not more than one half of the said number of vessels so allotted and specified shall be moored with their heads up the river, nor more than one half of the said number of vessels with their heads down the river.

6. No more vessels shall be placed or permitted to remain at or in the several stations for colliers below Blackwall, at one time, than the number herein respectively specified, (that is to say)—

ON THE SOUTH SIDE OF THE RIVER.

Station No. 1, from Blackwall	
Point to the Charlton Ferry	
Bugsby's Hole	Seventy-five vessels.
Station No. 2, Galleons.	Fifteen vessels.

Number of colliers to be moored at the several stations.

7. No vessel shall, under any circumstances, without an order or consent for that purpose first had and obtained from the harbour-master, remain in any of the tiers in the said river for a longer period than fifteen days next after such vessel shall have entered any such tier, exclusive of the day of entering the same.

No vessel to remain longer than fifteen days.

8. Every vessel admitted into any tier in any part of the river shall go out and remove from such tier at the next succeeding flood-tide after its cargo shall have been discharged, and shall forthwith proceed to such station as shall be for that purpose appointed by the harbour-master, who is hereby authorized and required in case of any such vessel not being so removed within the time aforesaid, to remove the same from such tier, and to take and place the same in such part of the river as shall be by him for that purpose deemed fit; and the expenses of so removing and placing such vessel shall be recoverable from the owner or owners of the said vessel, or from the master thereof, to the use of the Conservators, as provided by the Thames Conservancy Act, 1857.

Vessels to remove from tiers at the next flood tide.

9. No vessel shall lie at, be placed, made fast, or moored in any of the in-shore passages or ferries or upon the banks or shores of the river, so as to prevent the free transit of any other vessel. And it shall be lawful for the harbour-master forthwith to unmoor and remove, or cause to be unmoored and removed, any vessel so placed, made fast, or moored, and the amount of the charges and expenses of such unmooring and removal shall be recoverable from the owner or owners, or from the master of the said vessel, to the use of the said Conservators, as provided by the Thames Conservancy Act, 1857.

No vessel to be moored in in-shore passages or ferries, so as to obstruct.

10. No vessel shall be anchored, moored, or placed between the tiers hereinbefore mentioned, or outside the stations hereinbefore mentioned, or in any part of the navigable water-way of the river, otherwise than by the order and direction of the harbour-master.

No vessel to be anchored between the tiers or in the water-way.

11. The harbour-master may give notice for the removal, within a time to be in the said notice specified, of any vessel which shall at any time be so moored, anchored, or placed in any part of the river, as in his opinion shall encroach upon the free navigation of the river, to such other place as such harbour-master in his discretion shall see fit, such notice to be given to the master of such vessel, or in case there shall be no person on board the said vessel, then such notice to be affixed and left affixed to some conspicuous part of such vessel, and in case the same shall not be removed in accordance with the said notice before the expiration of such time, the harbour-master is hereby authorized to remove or cause to be removed any such vessel, and the amount of the charges and expenses of such removal shall be recoverable from the owner or owners, or from the master of the said vessel, to the use of the Conservators as provided for by the Thames Conservancy Act, 1857.

For removal of vessels encroaching upon the passage.

12. No vessel shall be brought up, stopped or placed so as to encroach upon or obstruct the free navigation of or passage on the river, nor on any vessel going into any of the said tiers, or quitting the same and getting into the stream of the fair way of the river, shall any anchor be let go therefrom (except for the purpose of navigating such vessel), and no part of the cargo of any vessel and no ballast shall be discharged or taken in whilst the same is lying in the stream of the fair way of the river, and the harbour-master

Vessels obstructing passage to be removed.

is hereby authorized and required to remove any vessel so causing such obstruction to the navigation and fair way of the river, and the amount of the charges and expenses of such removal shall be recoverable from the owner or owners or master of such vessel to the use of the Conservators, as provided by the Thames Conservancy Act, 1857.

As to floats or
rafts.

13. No float or floats, or raft or rafts of timber, either singly or together, exceeding sixty feet in length (except timber in one length), and twenty feet in width, shall be permitted to go into or pass along any part of the stream of the river between Bugsby's Hole and London Bridge, nor shall any float or floats, raft or rafts of timber, exceeding forty feet in width, be permitted to go into or pass along any other part of the stream of the river, nor shall any two or more floats or rafts of timber go or float abreast, nor shall more than three such floats or rafts in one body in continuous succession go into or pass along any part of the said stream lengthways, nor shall any following float or raft of timber go within the distance of three hundred yards of any other such float or raft floating upon the stream of the river.

14. *Repeated 11th July, 1877.*

Course of
vessels navi-
gating
Gravesend
Reach.

15. All vessels navigating Gravesend Reach are to keep to the northward of a line defined by a skeleton beacon erected upon the India Arms Wharf on with the high chimney of the Cement Works at Northfleet; and all vessels intending to anchor in the Reach are to bring up to the southward of that line. A lantern is placed on the above beacon which shows (at night) a bright light to the northward of the same line, and a red light to the southward of it, over the anchorage ground. All vessels so anchoring and remaining beyond a period of twenty-four hours are to be moored.

Barges over
50 tons to
have two
persons to
navigate them.

16. All barges, boats, lighters, and other like craft navigating the river shall, when under way, have at least one competent man constantly on board for the navigation and management thereof, and all such craft of above 50 tons burden shall, when under way, have one man, in addition, on board to assist in the navigation and management of the same, with the following exceptions:—When being towed by a steam vessel, or when being moved to and fro between any vessels or places a distance not exceeding 200 yards; and in case of non-compliance with this present bye-law, the harbour-master may take charge of and remove such craft to such place as to such harbour-master may seem fit, and the amount of the charges and expenses of taking charge thereof, and of such removal, shall be recoverable from the owner or owners or master thereof, to the use of the Conservators, as provided by the Thames Conservancy Act, 1857.

Left anchors
to be buoyed.

17. Any vessel slipping or parting from her anchor, shall leave a buoy to mark the position of such anchor.

As to anchors
in the stream.

18. No anchor or anchors shall be suffered to lie or remain in the stream of the river outside of the line of the said tiers so as to endanger any vessel. And if any anchor or anchors of any vessel shall be so permitted or suffered to lie or remain in the stream of the river outside of the line of any of the tiers in such a manner as in the judgment of the harbour-master to endanger the vessels passing up or down the river, it shall be lawful for the harbour-master, and he is hereby required to deliver or cause to be

delivered on board such vessel a notice in writing, signed by him, requiring the master of such vessel forthwith to remove such anchor or anchors, and if such master shall not within a reasonable time after the delivery of such notice, remove such anchor or anchors, the harbour-master is hereby further authorized and required to remove or cause to be removed such anchor or anchors, the amount of the charges and expenses of such removal shall be recoverable from the owner or owners or master of the said vessel to the use of the Conservators, as provided for by the Thames Conservancy Act, 1857.

19. No vessel shall navigate or lie in the river with its anchor or anchors a cock bill, except while fishing such anchor or anchors or during such time as may be absolutely necessary for getting such vessel under way or for bringing it to anchor.

Anchors a cock bill.

20. No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse, unless the stock shall be awash, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way.

Anchors hanging up by the cable.

21. In the loading and unloading of any vessel in any one of the said tiers in the river when and as often as it may be found requisite and necessary for any vessel to lie alongside another for the purpose of receiving or delivering goods or ballast, it shall and may be lawful for the harbour-master to direct and require the master of any such vessel as aforesaid to slack off the same, and in case of non-compliance by the master with the said direction the harbour-master is hereby authorized to slack off such vessel lying alongside as aforesaid.

Vessels to be slacked off if required.

22. No vessels which shall hereafter be laid or stationed in any of the said tiers in the river shall lie or be boomed off from each other, unless when necessary for the purpose of admitting any other vessel alongside the same, and every such vessel, (except the outward one at each end or extremity of such tier,) shall be laden over the bows thereof, and not otherwise, unless from the weight or bulk of the goods or nature of the merchandize it shall be deemed by and appear to the harbour-master necessary to load or unload the same alongside, and when and so often as the harbour-master shall direct any vessel to be so loaded or unloaded, every master of any vessel so lying in the said tier as aforesaid, when required to do so by such harbour-master, shall as speedily as possible slack the breastfasts and moorings of his vessel for the purposes aforesaid.

Vessels not to be boomed off, and to be laden over the bows.

23. No private chain or chains shall be affixed to the public moorings in the river without the permission of the harbour-master first had and obtained, and if any such private chain or chains shall be affixed to the said public moorings, the harbour-master is hereby authorized to remove the same therefrom.

As to the public moorings.

24. No vessel shall be moored to the public moorings in the river otherwise than by the proper rings and bridles.

Vessels at moorings.

25. Every vessel lying in any of the said tiers in the river shall have a bow and stern lashing to the vessel next to it in the said tier.

Vessels in tiers.

26. Every master of any vessel which shall be moored or navigated on any part of the river with a warp, hawser, rope, or chain,

When hawser to be slacked.

Moorings to be slackened when required.

As to mooring steam-vessels.

No steam vessel while attached to mooring to have engines in motion.

Master of steam vessel to remain on paddle-box or bridge.

No person to be taken on board nor leave steam-vessel whilst in motion.

Steam-vessels plying on river to show places between which they ply.

Vessels for certain purposes to be licensed by Conservators.

Precautions in taking in or discharging ballast.

Barges to have fifteen inches free board.

Penalties for intoxication, &c.

or having a rope across for any purpose whatsoever, unless in the act of entering or departing from any dock, shall slack the same down on the approach of any other vessel which shall be proceeding, dropping or sailing with or against the tide.

27. The harbour-master may order the moorings to be slackened down, or the sails to be furled, or the yards, masts, and booms, or any or either of them respectively, of any vessel lying or being in the said river, forthwith to be struck or run in, whenever in the judgment of any such harbour-master it shall be proper and expedient for the safety of any vessel or vessels so to do.

28 & 29. *Repealed 18th March, 1880.*

30. No steam-vessel shall be worked, navigated or placed upon, or anchored or moored in the river within three hundred and sixty feet of her Majesty's dock-yard or arsenal at Woolwich, or of her Majesty's victualling-yard at Deptford.

31. No master of any steam-vessel, engineer, or other person therein shall set the engine or engines of such steam-vessel in motion during the time that such steam-vessel shall be attached to any mooring or moorings in the river.

32, 33, 34 & 35. *Repealed 18th March, 1880.*

36. The master of every steam-vessel navigating the river shall be and remain on one of the paddle-boxes, or on the bridge of such steam-vessel, and shall cause a proper look out to be kept from the said steam-vessel during the whole of the time it is under way, and shall remove or cause to be removed any person other than the crew who shall be on the bridge or paddle-boxes of such steamer.

37. No person shall be taken on board any steam-vessel navigating the said river, nor leave the same for the purpose of landing, whilst the vessel is in motion; nor shall the engine thereof be put in motion until any boat or wherry bringing or taking away any passenger to or from such steam-vessel shall be sufficiently clear thereof.

38. Every steam-vessel navigating the river, and conveying passengers from any landing place to any other landing place thereon, shall have painted and conspicuously displayed on the outside of such vessel, and on each side thereof, in letters of not less than three inches in length, the names of the places between which such vessel plies.

39. No vessel shall be used for the purpose of carrying away refuse from gas-works or other manufactories, or mud or other liquid or solid substances of an offensive and deleterious nature, which it is unlawful to cast into the Thames, other than the vessels licensed by the Conservators for that purpose under their seal.

40. No master of any vessel shall take in or discharge ballast, unless canvas or tarpaulings be affixed below the ballast port, and extend down inside the barges, so as to prevent the ballast falling into the river.

41. No person shall navigate any barge or lighter on the river below London Bridge unless there shall be a free board of at least fifteen inches, to be measured from the waters-edge to the top of the coamings of the hatches; and if there be no coamings there shall be a free board of at least fifteen inches, to be measured from the waters-edge to the top of the gunwale.

42. Any master, engineer, waterman or other person engaged in

navigating any vessel in the river who shall be intoxicated while so engaged, and any person whosoever engaged or employed on the river who shall make use of abusive or insulting language to any officer of the Conservators whilst employed in the performance of the duties of his office, or shall obstruct any such officer in the execution of his said duties, shall be deemed to have committed a breach of these present bye-laws, and shall be liable to the penalty hereinafter mentioned.

43 & 44. *Repealed by Explosives Bye-laws, 26th January, 1876.*

45. The master or owner of any vessel entering or leaving the Thames, subject to the payment of tonnage due, and which has not been entered at the office of H.M. Customs and on which the tonnage dues have not been paid to the receiver there, shall furnish the Conservators, for the purpose of registration, full particulars of the name, tonnage, and owner of such vessel, and the port to which she belongs; and shall send a return once in every month of the arrival and departure of such vessel during the preceding month to the office of the Conservators, and shall pay to the Conservators the tonnage rates which are then due for each time of arrival in, and departure from the river, provided by the Act of the 4th and 5th Wm. IV., cap. 32, entitled, "An Act for rendering the Tonnage Rates payable in the Port of London."

As to payment of tonnage dues on vessels not entered at the Customs.

46. *Repealed 18th March, 1880.*

47. No person shall unload on the towing-paths of the river any sand, gravel, timber, or other material, or place any rubbish, boats, carts, or any articles whatsoever upon the said towing-paths, or on the banks thereof.

Obstructions on towing-paths.

48. No person shall ride or drive any horse (except when towing vessels) or drive or place any cart, waggon, or other vehicle over or upon any part of the towing-paths, unless there be a public right of way for such carts, waggons, or other vehicles, or allow cattle to pasture upon the same.

Trespasses on towing-paths.

49. No person shall remove any stones, clay, or other material from the banks, weirs, tumbling bays, towing-paths, or any other of the works of the Conservators.

Removing stones, &c.

50. No person shall place any vessel on the shores of the river in front of the towing-paths.

Vessels not to be placed in front of towing-paths.

51. The navigable part of the channel of the river above Teddington Lock shall at all times be kept clear for the passage of all vessels navigated thereon, and no vessel shall be stopped on any account whatsoever in the navigable part of the said channel, so as to prevent or obstruct the free and clear passage of any other vessel.

Channel not to be obstructed.

52. If any vessel, or other matter whatsoever, shall be wilfully placed or stopped, or accidentally be aground or sunk in any part of the river above Teddington Lock so as to impede, hinder, or obstruct the free and clear navigation thereof, the owner or any person having the care of such vessel, or other matter shall, immediately on the request of any person hindered or obstructed, or of any officer of the Conservators, remove such impediment or obstruction, so as to open and clear the channel of the river, and on the refusal or neglect of the person concerned and directed as aforesaid to remove such obstruction in a reasonable time, any officer of the Conservators is hereby authorized forthwith to remove, or cause

As to removal of obstructions above Teddington Lock.

to be removed such obstruction or impediment, and, if necessary, to cause to be unloaded any such vessel, and the costs of such removal shall be paid by the owner of such vessel or other matter.

Vessels
between
Teddington
and Reading
to be measured
and marked as
to capacity.

53. The owner of every vessel used for carrying goods or merchandize for hire on the river between Teddington and Reading, which vessel has not been weighed out, measured, marked and numbered, shall, on being requested so to do by the Conservators, or any of their officers, cause the same to be taken to the Thames Conservancy Works at Kew or Shepperton, for the purpose of being so weighed out, measured, marked and numbered, and the owner of every such vessel shall permit the Conservators to affix on each of the external sides of every such vessel three pieces of copper legibly marked with the feet and inches, measured from the bottom or chine of such vessel, and shall permit the same to be renewed so often as the same shall be worn out, or torn off in any part, or in the whole.

Vessels not to
stop in locks.

54. No vessel shall enter into any lock unless there be sufficient water to float and carry such vessel through such lock, and the channel or cut leading to or from the same, and no vessel or float shall on any account whatsoever stop in any lock longer than is absolutely necessary for the filling or emptying such lock and passage through the same, and for the lock-keeper to gauge the vessel and settle the toll payable in respect thereof.

As to vessels
passing locks
without pay-
ing the toll.

55. If any vessel shall have passed through any lock, and the tolls for the passage thereof shall not have been duly paid, such tolls shall and may be demanded, received, and taken at any other lock through which such vessel or float is to pass in the same passage, before the same be permitted to pass.

Sails not to be
used in locks.

56. No vessel used for carrying goods or merchandize shall enter any lock with sail up, nor hoist any sail during the time it continues in lock, and from every vessel having entered a lock, a fast or rope shall be immediately put out and made fast to some pile for that purpose on shore, in order to prevent the vessel from running foul of the gates, or other works in the lock, and the bargemen or others on board any vessel shall not hold with their poles in any lock.

As to tow
lines.

57. When any vessel is stopped between the towing-path and the navigable channel, the mast, or towing-mast, or the funnel, shall be lowered so as to permit the towing-lines of any other vessel to pass without obstruction; and when any vessel shall be moored at any wharf or elsewhere to be laden or unladen, or otherwise, the same shall be securely made fast at both ends thereof, and shall be laid as close to and along the side, or front of such wharf as conveniently may be.

Ferry boats.

58. No person shall take away or use any ferry-boat at any of the ferries, or any pole or poles or tackle belonging to such ferry, without the consent of the ferryman first obtained.

Injury to
banks.

59. No person employed on board any vessel shall wilfully, or without actual necessity, place or hold a pole against any of the banks and towing-paths, or works, so as to injure or damage the same.

As to tres-
passers on
towing-paths
and injuries to
works.

60. No owner of towing-horses, or his servant, or driver shall permit or suffer the towing-horses or any of them, to go out of the towing-paths, or to trespass, graze or trample on the lands adjoin-

ing such towing-paths, or shall leave any of the gates on the towing-paths or bridges open, or leave any swing-bridge open, or suffer the towing-lines to tear away or damage any rails, gates, posts, bridges or works.

61. No person shall erect any new buck or weirs, or drive or affix any piles or stakes, or make any hedge, or plant any willows or osiers in the river without the permission of the Conservators. As to planting osiers or erecting bucks.

62. Every barge shall be gauged at each lock and the actual draft shall be inserted on the ticket, and in case of any obstruction being offered by any barge-master or his servant by refusing to show the lock-keeper a manifest or invoice of his cargo, the toll shall be taken at the full burden which the barge is capable of carrying. Barges to be gauged and ticket shown of cargo.

63. No person under any pretence shall use or meddle with the sluices of the Conservators without the permission of the lock-keepers. Persons not to meddle with sluices.

64. No vessel shall be towed upon the river from the bank, otherwise than from a mast of sufficient height to protect the banks, gates, and works from injury by the towing-line, except in places where the strength of the stream renders it necessary that the line should be brought down to the vessel and made fast. Mode of towing.

65. Two flashes and no more shall be penned for or drawn in a week on such days, and at such hours as the Conservators shall from time to time by order of the board appoint. Previously to the drawing for such flashes, all the flood gates and sluices, and shuttles at all mills and weirs shall be close shut in, and be kept close shut in till the flash is at best, and such flash shall then be drawn, and all the flood-gates and sluices, and shuttles at the several mills and weirs shall be opened. And all the flood-gates, sluices, and shuttles at the said mills and weirs shall be kept open to permit such flash to pass without obstruction until the water is drawn down to low-water-mark (if necessary), and be kept so for three hours (if necessary) after the opening or drawing thereof. Immediately after sufficient water has been drawn for the navigation, the flood-gates, sluices, and shuttles shall be close shut in, and kept close shut in until the water shall have risen to the low-water-mark affixed at the adjoining locks. Flashes.

66. No owner or occupier of a mill shall, except in case of sudden necessity, draw down the water at the mill for the purpose of repairs to the works of such mill, or for cleansing the mill stream, unless he shall have given notice in writing of his intention so to do to the Conservators at their office seven days previously thereto. Millowners to give notice before drawing down water for repairs.

67. The toll at each lock upon every new vessel capable of carrying ten tons, but ungauged, built in the upper district for the lower, shall be 2s. 6d.; a declaration of the number of tons on board shall be produced at each lock. Tolls.

68 & 69. *Repealed 28th November, 1874.*

70. *Repealed by Bye-laws of 17th May, 1879, which regulate the tolls as follows:—*

Persons in charge of pleasure boats passing through, by, or over any of the locks on the river Thames, shall pay to the lock-keepers or other persons authorized to receive tolls, the sums contained in the following table:— Pleasure boat tolls for locks.

For every steam pleasure-boat and passenger
steamer Eighteenpence

Class 1.—For every sculling-boat, pair-oared row-boat, and skiff, and for every randan, canoe, punt, and dingey	Threepence
Class 2.—For every four-oared row-boat (other than boats enumerated in Class 1) and sailing-boat	Sixpence
Class 3.—For every row-boat shallop, over four oars (other than boats enumerated in Classes 1 and 2)	One shilling
For every house-boat, under fifty feet in length	One shilling and sixpence
For every house-boat, over fifty feet in length	Two shillings and sixpence

The above charges to be for passing once through, by, or over a lock and returning on the same day.

In lieu of the above tolls, pleasure steamers or row-boats may be registered on the payment to the Conservators of the undermentioned sums, and shall in consideration of such payment pass the several locks free of any other charge from the 1st day of January to the 31st day of December in each year.

	Per annum.
For every steam pleasure-boat and steam passenger-boat, not exceeding thirty-five feet in length	£ s. d. 5 0 0
Ditto above thirty-five feet in length, and not exceeding forty-five	7 10 0
Ditto exceeding forty-five feet in length	10 0 0
For every row-boat of Class 1	2 0 0
For every row-boat or yacht of Class 2	2 10 0
For every row-boat of Class 3	3 0 0
For every house-boat, not exceeding thirty feet in length	3 0 0
Ditto above thirty and not exceeding fifty feet in length	5 0 0
Ditto exceeding fifty feet in length	7 10 0

In computing the tolls every number less than the entire numbers above stated is to be charged as the entire number.

The above rates on Classes 1, 2 and 3 to be doubled if towed by horse or any other animal.

The plate, with the registered number thereon, is to be fastened on to the boat for which it is issued, and is not transferable from one boat to another.

Tickets of registration to be produced.

71. Persons using any boat registered on an annual payment shall at all times when required by any lock-keeper, produce the certificate of such registration, or pay the toll authorized to be taken from persons passing through locks in an unregistered boat, and every boat registered for an annual payment shall have attached to it in some conspicuous place, and securely fixed, to the satisfaction of the Conservators, a metal ticket to be issued by the Conservators, containing the number of such registration, and on the expiration of such registration the said ticket shall be returned to the Conservators.

Penalty for breach of bye-laws.

72. Any person committing any breach of, or in any way infringing any of these bye-laws, shall be liable to a penalty of and shall forfeit a sum not exceeding 5*l.*, which said penalty shall be recovered, enforced, and applied according to the provisions of the "Thames Conservancy Acts, 1857 and 1864."

II. *Bye-laws framed under an Order in Council,
28th November, 1874.*

1. The rules and bye-laws numbered 68 and 69 in the Rules and Bye-laws for the regulation of the navigation of the River Thames, allowed by her Majesty in Council, at a Court held the 5th day of February, 1872, shall, after these present Bye-laws have been allowed by Order of Her Majesty in Council, be and the same are hereby repealed.

Tolls.

2. The following tolls, rates or duties shall be taken by the Conservators from the owners, coast bearers, or chief boatmen of and for every vessel carrying a cargo, and passing through any lock or locks between Cricklade and Staines, or *vice versâ*, for the use of such lock or locks according to the burthen or tonnage of such vessel, the measurement of such burthen or tonnage to be limited as in the 6th clause of the said Act 28th George III. chap. 51, that is to say:—

The sum of 2*d.* per ton at every lock, subject to such provisions as to the aggregate of tolls as hereinafter mentioned.

If the vessel in the downward voyage shall pass through all the locks between the undermentioned places, the aggregate of such tolls per ton shall be as follows:

		Per Ton.
For all locks between—		s. d.
Oxford and Abingdon inclusive	.	0 6
" " Wallingford	"	1 0
" " Pangbourne	"	1 6
" " Reading	"	1 9
" " Henley	"	2 0
" " Marlow	"	2 6
" " Maidenhead	"	2 9
" " Windsor	"	3 0
" " Staines	"	3 6

If the vessel, in the upward voyage, shall pass through all the locks between the undermentioned places, the aggregate of such tolls per ton shall be as follows:

		Per Ton.
To all locks between—		s. d.
Staines and Windsor inclusive	.	0 3
" " Maidenhead	"	0 6
" " Marlow	"	0 9
" " Henley	"	1 3
" " Reading	"	1 9
" " Pangbourne	"	2 0
" " Wallingford	"	2 6
" " Abingdon	"	3 0
" " Oxford	"	3 6

Oxford and Cricklade 2*d.* per ton for each lock.

For timber in rafts—

The same rate per ton as is charged if conveyed in vessels, there being 50 cubic feet in one ton.

TOLL FOR FERRIES.

3. The following tolls shall be paid for the use of the Conservators' ferry boats above Teddington Lock for every time of passing, namely :—

For every horse not engaged in towing, taken across by ferry-boat, the sum of	3 <i>d</i> .
For every carriage, wagon, cart, or other vehicle in addition to the toll on the horse	3 <i>d</i> .
For every foot passenger	1 <i>d</i> .

INTERPRETATION CLAUSE.

4. The interpretation clause numbered 2 in the rules and bye-laws approved on the 5th day of February, 1872, above referred to, shall apply to these present rules and bye-laws; and the present rules and bye-laws, when so allowed as aforesaid, shall be incorporated with, and read and taken as part of, the said rules and bye-laws allowed as aforesaid on the 5th day of February, 1872.



III. *Bye-laws framed under an Order in Council,* 17th March, 1875.

1. *Repealed 18th March, 1880.*

Lights for
dumb barges
below Charl-
ton Pier.

2. Every person in charge of a dumb barge when under weigh and not in tow shall, between sunset and sunrise, when below or to the eastward of a line drawn from the upper part of Silvertown, in the county of Essex, to Charlton Pier, in the county of Kent, have a white light always ready, and exhibit the same on the approach of any vessel.

Lights for
barges in tow.

3. The person in charge of the sternmost or last of a line of barges, when being towed, shall exhibit between sunset and sunrise a white light from the stern of his barge.

4 & 5. *Repealed 18th March, 1880.*

Boat races, re-
gattas, &c.,
below Staines.

6. On the occasion of any boat race, regatta, public procession, or ship launch in the river Thames below Staines, or on any other occasion when large crowds assemble thereon, no vessel shall pass on the river so as to obstruct, impede, or interfere with the boat race, regatta, procession, or launch, or to endanger the safety of persons assembling on the river, or to prevent the maintenance of order thereon, and the master of every vessel shall, on all such occasions, observe the directions of the harbour master or other officer of the Conservators of the Thames engaged in superintending the execution of this bye-law.

No vessel to
be moored to
piers, &c.,
without per-
mission.

7. No vessel shall be moored to or remain at any pier or vessel of or to or at any premises belonging to the Conservators of the river Thames, without the permission of their officer in charge of such pier, vessel, or premises being first had and obtained, and shall move away when ordered so to do.

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8. In construing the sixteenth bye-law of the rules and bye-laws for the regulation of the navigation of the river Thames, allowed by her Majesty in Council at a court held on the fifth day of

February, one thousand eight hundred and seventy-two, the word "burden" shall mean the burden or burthen of a barge as registered at Waterman's Hall. 16th bye-law, 1872.

9. Any master or person in charge of any vessel or barge failing in any respect to comply with or committing any breach of or in any way infringing any of these bye-laws, shall be liable to a penalty of, and shall forfeit a sum not exceeding, five pounds for each offence, which penalties shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts, 1857 and 1864. Penalty.

IV. *Bye-laws framed under an Order in Council,* 11th July, 1877.

1. Bye-law No. 14 of the bye-laws of 1872 for the regulation of the navigation of the river Thames, allowed by order of her Majesty in Council, on the 5th February, 1872, shall, after these present bye-laws shall have been allowed by order of her Majesty in Council, be, and the same is hereby repealed, and in lieu thereof :

2. All vessels navigating the river between the Albert Bridge, at Chelsea, and Charlton Pier, shall be navigated singly and separately, except small boats fastened together, or towed alongside, or astern of other vessels, and except vessels towed by steam.

3. Vessels towed by steam shall be placed two abreast, if more than four in number, and not more than six, shall be towed together at one time.

4. Above and to the westward of the Albert Bridge, at Chelsea, six vessels and no more may be towed together in a single line, at one time, and the distance between any two of the vessels, so towed, shall not exceed fifty feet.

5. *Repealed 18th March, 1880.*

6. All persons cutting weeds in the river Thames or in any stream, canal, or watercourse communicating with the river, shall remove such weeds immediately after cutting so as to prevent their passing into the river, and no person shall throw or cause to be thrown any weeds, grass, or matter of a like nature into the river Thames, or into any stream, canal, or watercourse communicating with the river.

7. Any person committing any breach of or in any way infringing any of these bye-laws shall be liable to a penalty of and shall forfeit a sum not exceeding 5*l.*, which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts, 1857 and 1864.

V. *Bye-laws framed under an Order in Council,* 11th Nov., 1869.

1. These bye-laws may be cited as the Upper Thames bye-laws Short title. of 1869.

2. These bye-laws shall come into operation the day after the Commence-ment of operation.

same are allowed by order of her Majesty the Queen in Council (which time is in these bye-laws referred to as the commencement of these bye-laws).

Application.

3. These bye-laws extend and apply only to the river Thames, or the rivers Thames and Isis, from the city-stone near Staines to Cricklade (which part of the river is in these bye-laws called the Upper River); and nothing in these bye-laws shall affect the rules, orders, and ordinances made by the Court of the Mayor and Aldermen of the city of London the fourth day of October, one thousand seven hundred and eighty-five (relative to fishing in the river Thames below the city-stone aforesaid), or the rule, order, or ordinance made by the Conservators of the river Thames the twenty-third day of January, one thousand eight hundred and sixty, amending those rules, orders, and ordinances, or any other rule, order, or ordinance, or bye-law, applying to the river Thames below the city-stone aforesaid, and in force at the commencement of these bye-laws.

Interpretation.

4. In these bye-laws, except where otherwise provided, words have the same meaning and effect as in the above-mentioned Acts.

5. The provisions of these bye-laws, and penalties imposed thereby, and remedies for the enforcement thereof, shall be deemed to be in addition to, and not in substitution for, any statutory provision in force at the commencement of these bye-laws, and penalties imposed thereby, and remedies for the enforcement thereof.

Boat races, &c.

6. Any vessel being on the upper river on the occasion of any boat race, regatta, public procession, or launch of any vessel, or on any other occasion when large crowds assemble thereon, shall not pass thereon so as to impede or interfere with the boat race, regatta, procession, or launch, or endanger the safety of persons assembling on the river, or prevent the maintenance of order thereon; and the master of every such vessel, on any such occasion as aforesaid, shall observe the directions of the officer of the Conservators engaged in superintending the execution of this bye-law; and if any such master fails in any respect to comply with the requirements of this bye-law, or does anything in contravention thereof, he shall be deemed guilty of an offence against these bye-laws, and shall for every such offence be liable to a penalty not exceeding 5*l*.

Penalty.

VI. *Bye-laws framed under an Order of Council*
18th of March, 1880.

Bye-laws numbered 28, 29 with subsections (a) (b) (c) (d) (e) (f) (g) (h) (i) (j), and 32 with subsections (a) (b) (c) (d), 33, 34, 35 with subsections (a) and (b), and 46 allowed by Order of her Majesty in Council on the 5th February, 1872, and the bye-law so allowed on the 20th November, 1873, and bye-laws numbered 1, 4, 5 so allowed on the 17th March, 1875, and bye-law No. 5 so allowed on the 11th July, 1877, shall after these present bye-laws have been allowed by Order of her Majesty in Council be, and the same are hereby repealed.

The word "vessel" shall mean any ship, lighter, barge, boat,

wherry, punt, canoe and any kind of craft whatever, whether navigated by steam or otherwise.

The word "river" shall mean that part of the river Thames which is within the jurisdiction of the Conservators between Crick-lade, in the county of Wilts, and Yantlet Creek, in the county of Kent.

1. In obeying and construing the following rules due regard shall be had to all dangers of navigation; and to any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger.

2. Nothing in the following rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights, or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

BYE-LAW for the REGULATION of the NAVIGATION of the RIVER.

3. Every steam vessel navigating the river shall be navigated with care and caution, and at a speed and in a manner which shall not endanger the safety of other vessels or moorings, or cause damage thereto, or to the banks of the river. Special care and caution shall be used in navigating such steam vessel when passing vessels employed in dredging or removing sunken vessels or other obstructions.

If the safety of any vessel or moorings is endangered or damage is caused thereto or to the banks of the river by a passing steam vessel, the onus shall lie upon the owner of such steam vessel to show that she was navigated with care and caution, at such speed and in such a manner as directed by this rule.

BYE-LAWS and RULES for the REGULATION of the NAVIGATION of the RIVER between YANTLET CREEK and TEDDINGTON LOCK.

Rules concerning Lights.

4. The lights mentioned in the following rules, numbered 5 to 10 and no others, shall be carried in all weathers, from sunset to sunrise.

5. A steam vessel when under way shall carry:

(a.) On or before the foremast, or if there be no foremast, on a staff at the forepart of the vessel at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass; so fixed as to throw the light ten points on each side of the vessel,—viz., from right ahead to two points abaft the beam on either side: and of such a character as to be

visible on a dark night, with a clear atmosphere, at a distance of at least two miles. Provided that steam vessels which navigate both above and below London Bridge, shall not be required to carry their lights at a greater height than twelve feet above the hull.

Steam vessels navigating only above London Bridge may carry the white light at any convenient height above the stem.

- (b.) On the starboard side, a green light so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least one mile.
 - (c.) On the port side, a red light, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass: so fixed as to throw the light from right ahead to two points abaft the beam on the port side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least one mile.
 - (d.) The said green and red side lights shall be fitted in such a manner as to prevent these lights from being seen across the bow.
 - (e.) A steam vessel, when towing another vessel shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than four feet apart. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steam vessels are required to carry.
 - (f.) A steam vessel towing may also carry a light showing astern as a guiding light to the vessel or vessels towed, but this light must be so screened as not to be visible further forward than four points abaft her beam.
6. A sailing vessel under way, or being towed, shall only carry the side lights provided by (b) & (c) of rule 5 for a steam vessel under way.
7. A steam vessel, a sailing vessel or a barge, when at anchor in the river, shall carry where it can best be seen, at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to show a clear uniform and unbroken light, visible all round the horizon, at a distance of at least one mile; provided always that where masted vessels are lying in tiers, the outermost off shore masted vessels only of each tier shall each carry a light similar to that required for vessels at anchor; but barges lying at the usual barge moorings in the river above Barking Creek shall not be required to exhibit such riding light.
8. A vessel which is being overtaken by another vessel below Barking Creek shall show from her stern to such last mentioned vessel a white light, or a flare up light.

This rule shall not apply to boats, wherries, punts, or canoes.

9. All vessels when employed to mark the positions of wrecks or

other obstructions shall exhibit two bright lights placed horizontally not less than six nor more than twelve feet apart.

10. Every steam dredger moored in the river shall, between sunset and sunrise, exhibit three bright lights from globular lanterns of not less than eight inches in diameter, the said three lights to be placed in a triangular form, and to be of sufficient power to be distinctly visible with a clear atmosphere, on a dark night, at a distance of at least one mile, and to be placed not less than six feet apart on the highest part of the framework, athwart-ships.

Rules concerning Fog, &c. Signals.

11. All vessels entering or being overtaken by a fog shall be navigated with the greatest caution and at a very moderate speed.

12. Every steam vessel navigating the river shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstruction, and also with an efficient bell. Every sailing vessel navigating the river shall be provided with an efficient fog horn, and also with an efficient bell.

13. In fog, whether by day or night, the signal described in this rule shall be used, that is to say :

- (a.) A steam vessel under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.
- (b.) A sailing vessel under way shall sound her fog horn, at intervals of not more than two minutes.
- (c.) All steam vessels and all sailing vessels when in the fairway of the river, and not under way, shall at intervals of not more than two minutes ring the bell.

Rules as to Speed and Mode of Navigation.

14. Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, and shall stop and reverse if necessary.

15. Steam vessels navigating the river between Barking Creek and London Bridge, other than river passenger steamers certified to carry passengers in smooth water only, shall never exceed a speed of seven statute miles per hour over the ground whether with or against the tide.

16. Every sailing vessel or steam vessel, overtaking any other vessel, shall keep out of the way of the overtaken vessel, which latter vessel shall keep her course.

BYE-LAWS and RULES regulating the NAVIGATION of the RIVER between YANTLET CREEK and a line drawn from BLACKWALL POINT to BOW CREEK.

Steam-whistle Signals.

17. When two steam vessels are in sight of one another and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take :

- (a.) One short blast of the steam-whistle of about three seconds duration to mean "I am directing my course to starboard,

c.

Y Y

and intend to pass you portside to portside." The use of this signal shall be optional.

- (b.) Two short blasts of the steam-whistle, each of about three seconds duration, to mean "I am directing my course to port, and intend to pass you starboard side to starboard side."

This latter signal shall not be used in the case provided by rule 22 where that rule can be obeyed; but it shall be compulsory to use this signal when a departure from that rule is necessary to avoid immediate danger.

18. When it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel, she shall signify the same to the sailing vessel by four or more blasts of the steam-whistle in rapid succession, the blasts to be of about two seconds duration.

19. The signals by whistle mentioned in the preceding rules shall not be used on any occasion or for any purpose except those mentioned in the rules; and no other signal by whistle shall be made by any steam vessel unless it be by a prolonged blast of not less than five seconds duration.

Steering and Sailing Rules.

20. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz. :—

- (a.) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.
- (b.) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.
- (c.) When both are running free with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.
- (d.) When both are running free with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.
- (e.) A vessel which has the wind aft shall keep out of the way of the other vessel.

21. If a sailing-vessel and a steam-vessel are proceeding in such a direction as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel.

If owing to causes beyond the control of those navigating the steam-vessel it is unsafe or impracticable for the steam-vessel to keep out of the way of the sailing-vessel, she shall signify the same to the sailing-vessel by four or more blasts of the steam whistle in rapid succession, as mentioned in rule 18; the sailing-vessel shall then keep out of the way.

22. When two steam-vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

23. Steam-vessels navigating against the tide shall, before rounding the following points, viz., Coalhouse Point, Tilburyness, Broadness, Stoneness, Crayfordness, Cold Harbour Point, Jennings Point, Halfway House Point or Crossness, Margarettness or Trip-

cock Point, Bull Point or Gallionsness, Hookness, and Blackwall point, ease their engines and wait until any other vessels rounding the point with the tide have passed clear.

24. Steam-vessels crossing from one side of the river towards the other side, shall keep out of the way of vessels navigating up and down the river.

25. Where by the above rules one of two vessels is to keep out of the way, the other shall keep her course.

BYE-LAWS and RULES regulating the NAVIGATION of the RIVER
above TEDDINGTON.

26. When two steam-vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

27. Steam-vessels navigating against the stream shall ease, and if necessary stop, to allow vessels coming down with the stream to pass clear.

28. Every steam-vessel shall when under way after sunset and before sunrise, either carry the lights required for steam-vessels by rule 5, or exhibit a bright white light on or above the stem, or on the funnel.

29. The name of every steam-vessel navigating the river shall be painted or marked and kept in plainly legible characters not less than two inches in length on the outside of both bows and on the outside of the stern; and such name and the residence of the owner shall be registered with the Conservators.

30. Any person committing any breach of or in any way infringing any of these bye-laws shall be liable to a penalty of, and shall forfeit, a sum not exceeding 5*l.*, which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts, 1857 and 1864.

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